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No. _____

In The
Supreme Court of the United States

LARRY A. CAMPBELL,

Petitioner,

v.

JOHN W. LYON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Northern District of Maryland violated the Petitioner's due process rights under the Fifth Amendment to the United States Constitution by compelling the Petitioner to proceed to trial on a cause of action that: (i) had not been pled by the Respondent; (ii) was imposed *sua sponte* by the District Court less than one business day prior to commencement of trial; and (iii) shifted and elevated the burden of proof at trial from the Respondent to the Petitioner.

II. Whether the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Northern District of Maryland departed so far from the acceptable and usual course of judicial proceedings, by allowing the Respondent, in his capacity as a shareholder of a parent corporation, to maintain a direct cause of action against the board of directors of a subsidiary corporation in which the Respondent was not a shareholder, such that this Court should exercise its supervisory power.

III. Whether the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Northern District of Maryland departed so far from the acceptable and usual course of judicial proceedings, by granting equitable relief to Respondent after the District Court's finding that the Respondent and one of his witnesses had committed perjury both at trial and in prior proceedings in the case, such that this Court should exercise its supervisory power.

LIST OF ALL PARTIES TO PROCEEDINGS BELOW

The following persons were parties to the proceedings before the United States District Court for the Northern District of Maryland: Plaintiff John W. Lyon and Defendants Larry A. Campbell, Edward W. Storke and Robert B. Cook. In the United States Court of Appeals for the Fourth Circuit, the parties were Appellant Larry A. Campbell and Appellee John W. Lyon.

CORPORATE DISCLOSURE STATEMENT

No corporations were named parties to the underlying actions in the United States District Court for the Northern District of Maryland and the United States Court of Appeals for the Fourth Circuit.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS

The opinions and orders entered by both the United States District Court for the Northern District of Maryland and the United States Court of Appeals for the Fourth Circuit were unpublished.

STATEMENT OF JURISDICTION

On March 28, 2002, the Fourth Circuit decided *John W. Lyon v. Larry A. Campbell*, No. 01-1694 (App. 1-11). On April 23, 2002, the Fourth Circuit denied a timely-filed Petition for Rehearing with Petition for Rehearing *En Banc* (App. 99-100). This Petition for a Writ of Certiorari is being filed within ninety days of that denial in accordance with 28 U.S.C. § 2101(c) and Sup. Ct. R. 13(3). Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

This case involves the Fifth Amendment to the United States Constitution which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On April 14, 1998, Respondent John W. Lyon ("Respondent Lyon") instituted suit in the United States District Court for the Northern District of Maryland against Petitioner Larry A. Campbell ("Petitioner Campbell") and two other defendants, Edward W. Storke ("Mr. Storke") and Robert B. Cook ("Mr. Cook") (App. 222-232). Subject matter jurisdiction in the District Court was based upon 28 U.S.C. § 1332, in that diversity of citizenship existed among the parties and the amount in controversy exceeded the requisite dollar amount at the time of filing (App. 223). The case was assigned to The Honorable Frederic N. Smalkin, who presided over all proceedings in the District Court throughout the pendency of the case.

In his initial Complaint, Respondent Lyon asserted, derivatively and individually, causes of action for conversion, breach of contract and breach of fiduciary duty against Petitioner Campbell, Mr. Storke and Mr. Cook in their capacity as the directors of L-C, Inc. ("L-C"), a Maryland corporation (App. 222-232). Respondent Lyon's claims stemmed from the sale by L-C of a corporate asset, *i.e.*, real estate known as Oxen Cove, and the subsequent distribution of the proceeds of that sale by L-C's Board of Directors. However, as Respondent Lyon testified, he was not a shareholder of L-C, the corporate entity that sold the property and distributed the proceeds at issue in this case:

> Q. And who owned LC, Inc.?
> A. LC, Inc., was owned by ICE.
>
> Q. A hundred percent owned by ICE?
> A. A hundred percent.

(App. 182). At all times relevant, L-C was wholly owned by I.C.E., Inc. ("ICE"), a Nevada corporation, which was owned equally by Petitioner Campbell and Respondent Lyon (App.

182, 184). Thus, Respondent Lyon, in his capacity as a shareholder of ICE, filed suit against the directors of L-C, a separate corporate entity, in which Respondent Lyon was not a shareholder.

On November 18, 1998, the District Court granted Petitioner Campbell's Motion to Dismiss Respondent Lyon's claims for conversion and breach of contract (App. 95-98). The District Court, however, permitted the breach of fiduciary duty claim to proceed, stating, *inter alia*, that it "appears to assert some sort of derivative action on behalf of the corporations, but the Court is hard-pressed to discern its outlines . . . ." (App. 97) (emphasis added). Respondent Lyon made no attempt whatsoever to amend his cause of action, notwithstanding the District Court's strong hint that he do so. As pled by Respondent Lyon, and as both the District Court and the Fourth Circuit subsequently acknowledged during the summary judgment proceedings discussed *infra* at pages 4-5, the one remaining claim in the case placed the burden of proof on Respondent Lyon and afforded Petitioner Campbell and the other defendants the opportunity to assert the business judgment rule as a defense (App. 75-83, 84-91, 92). Discovery was conducted accordingly.

On June 15, 1999, towards the end of the discovery period, the District Court granted Respondent Lyon's Motion to File an Amended Complaint (App. 94). In the Amended Complaint, Lyon realleged his breach of fiduciary duty claim from his initial Complaint, and he added a claim for breach of directors' duty and a request for the involuntary dissolution of L-C, both of which were based upon Maryland statutes (App. 211-221). These statutory causes of action did not alter the burden of proof, and they did not vitiate the applicability of the business judgment rule as a defense.

On August 5, 1999, over one month after the close of discovery, the District Court denied Respondent Lyon's Motion for Leave to File a Second Amended Complaint (App. 93). In his proposed Second Amended Complaint, Respondent Lyon alleged additional facts and asserted additional claims for reimbursement, pursuant to Maryland statute, and for contribution, pursuant to common law, which had not been pled by him previously (App. 199-210). In denying Respondent Lyon's motion, the District Court held, in pertinent part, that:

> plaintiff has been dilatory in asserting the claims sought to be raised in the second amended complaint, and that to allow such amendment after the close of discovery, . . . would unfairly prejudice the defendants in their defense of this lawsuit and not be in the interests of justice . . . .

(App. 93) (emphasis added). Thereafter, both sides moved for summary judgment in the District Court.

On October 1, 1999, the District Court granted summary judgment on all counts in favor of Petitioner Campbell and the other defendants and against Respondent Lyon (App. 84-92). In his Memorandum Opinion, after discussing alternative reasons for his ruling, the District Court held that, "even if there was a continuing claim of breach of fiduciary duty that survived despite the foregoing discussion, it is barred as a matter of law by the business judgment rule." (App. 89). The District Court reached the same conclusion with respect to Respondent Lyon's statutory based claims (App. 90).

On October 13, 1999, Respondent Lyon appealed the District Court's grant of summary judgment, its dismissal of the breach of contract claim in his initial Complaint, and its denial of his motion to file a second amended complaint

after the close of discovery. The matters were briefed and oral argument was held before the Fourth Circuit on May 4, 2000 (App. 75).

On July 19, 2000, the Fourth Circuit issued an unreported per curiam Opinion (App. 75-83). The Fourth Circuit affirmed both the District Court's dismissal of the breach of contract count in the initial Complaint and the District Court's denial of Respondent Lyon's motion to file a second amended complaint (App. 76, 83). However, the Fourth Circuit vacated the award of summary judgment on the grounds that, *inter alia*, "for summary judgment purposes," there has been sufficient evidence proffered to rebut the presumption of the business judgment rule (App. 82). The case was then remanded to the District Court (App. 75, 83).

On August 15, 2000, the District Court ordered that the only further proceedings on remand would be a pretrial conference and a trial (App. 74). The pretrial conference was held on October 18, 2000 (App. 73), and the trial was scheduled to commence on Monday, April 23, 2001 (App. 71). Thereafter, the case laid dormant until the week before the trial was set to begin.

On Wednesday, April 18, 2001, three business days before the scheduled trial, the District Court ordered, *sua sponte*, that "plaintiff's case will proceed only on direct actions by him in his capacity as a shareholder against the directors of the corporation" since "plaintiff's shareholder derivative action on behalf of L-C, Inc. and ICE, Inc. is not properly before the Court . . . as the plaintiff's complaint was not verified as required by Fed. R. Civ. P. 23.1" (App. 70). The District Court's *sua sponte* ruling prompted Petitioner Campbell and the other defendants to file, on April 19, 2001, a Second Motion for Summary Judgment on the grounds that, *inter alia*, in light of the District Court's April 18 ruling, there was no longer *any* viable cause of

action in the case because Respondent Lyon's claim for breach of fiduciary duty could only be brought derivatively and the statutory count for breach of a director's duty could only be brought by the corporation pursuant to statute (App. 186-198). The District Court denied Petitioner Campbell's Second Motion for Summary Judgment as untimely (App. 47).[1]

On Friday, April 20, 2001, with the trial scheduled to commence Monday morning, the District Court summoned counsel to court and conducted a hearing "to consider the issues that were raised in [the District Court's] letter of April 18, which were addressed in terms of what there is for trial in this case, because, after all of these years of litigation, it is finally becoming clear to somebody, I guess me, what is involved in this case." (App. 47) (emphasis added). In a remarkable turn of events, recounted verbatim in the transcript set forth in the Appendix at App. 46-69, the District Court, again acting *sua sponte*, and in an obvious attempt to extricate itself from the implications of its other *sua sponte* ruling from two days earlier, transformed Respondent Lyon's claim, over objections from all parties, into a cause of action for the Imposition of a Constructive Trust (App. 46-69). Addressing counsel for Respondent Lyon at the April 20 hearing, the District Court stated:

> that is the reason why things are so loused up in this case because nobody has sat down and thought about it.

* * * * *

---

1 Petitioner Campbell contends that the Second Motion for Summary Judgment was timely filed. The Motion was filed one day after the District Court issued its *sua sponte* Order, limiting Respondent Lyon's claims to direct actions only. Since the District Court's *sua sponte* Order could not have been reasonably anticipated by the parties, Petitioner Campbell's Motion on that issue hardly could have been filed any time sooner.

what is going on here, sir, is, that you wish to impress the proceeds with a constructive trust. That's what's going on here. That is the theory of law.

* * * * *

Sir, the problem with your case is you have not thought it out.

* * * * *

What I am telling you, sir, is that under the law of Maryland, an action of this nature is an equitable action for imposition of a constructive trust.

* * * * *

Now, it is just that nobody, until just now, has sat down and thought about what's really happening here. They didn't think about it in Richmond. I didn't think about it when the case was before me earlier.

(App. 50-51, 53-54) (emphasis added).

At the conclusion of the Friday hearing, the District Court reiterated that its Order was being entered *sua sponte* and that its Order was, in fact, contrary to prior proceedings in the case. The District Court stated:

> But I'm going to go ahead and hear the case on Monday, but I am not going to call in a jury. What I am doing, basically, is visiting the issue *sua sponte* of whether there is a matter triable by a jury here, and basically reopening the pretrial conference. And my view now is there is not.

(App. 68) (emphasis added). The District Court then entered a written Order later that same day which read, in pertinent part, as follows:

> For the reasons stated in open Court . . . . the trial of this case will be conducted non-jury on the causes of action of Imposition of a Constructive Trust and Maryland Statutory Corporate Dissolution.

(App. 45) (emphasis added).

On Monday, April 23, 2001, prior to the start of trial, Petitioner Campbell and the other defendants renewed their objection to proceeding to trial on the cause of action of Imposition of a Constructive Trust. Counsel for Petitioner Campbell stated:

> And I just want to put on the record, Your Honor, our objection to going forward on the constructive trust. . . .

(App. 40). After further colloquy between the District Court and counsel, the District Court asked: "So what's the prejudice to the defendant, if any?" (App. 41). Counsel for Petitioner Campbell responded that the prejudice was that there is a "difference in the burden of proof with respect to the constructive trust" and "the business judgment rule might be rendered unavailable by the shift in presumption." (App. 41-42). Unpersuaded, the District Court overruled the objection, stating:

> Okay. The objection is on the record. I hear nothing that would indicate any prejudice. So we are going to go ahead. Go on.

(App. 42).

On Tuesday, April 24, 2001, the prejudice articulated by Petitioner Campbell's counsel less than 36 hours earlier was borne out in the District Court's final decision. After the close of evidence, the District Court clearly began to rule in favor of Petitioner Campbell, stating:

> where the evidence is in equipoise then the decision goes in terms of who has the burden of proof . . . . You [referring to Respondent Lyon] have the burden of proof because you're claiming the trust.

(App. 177). Respondent Lyon's counsel then corrected the District Court as to who had the burden of proof in light of the District Court's *sua sponte* ruling two business days earlier and, after review, the District Court agreed:

> Well, you're right about the shifting burden under Wimmer versus Wimmer [citation omitted].

(App. 178). Thereafter, having already stated that the evidence was in equipoise and having acknowledged that his *sua sponte* rulings on the eve of trial did in fact shift the burden of proof to Petitioner Campbell, the District Court proceeded to impose a constructive trust upon Petitioner Campbell in the amount of $897,500.00 (App. 37).

The District Court ruled in favor of Respondent Lyon, moreover, despite its finding that Respondent Lyon had committed perjury both at trial and, previously, before the Fourth Circuit through his submission of affidavits containing the same false statements in furtherance of his successful attempt to set aside the District Court's earlier grant of summary judgment in favor of Petitioner Campbell. Referring to Respondent Lyon and the false testimony, the District Court stated:

INTENTIONAL
BLANK

> I don't believe for a minute that he [Respondent Lyon] paid [Petitioner] Campbell's half [referring to the false testimony of Respondent Lyon and D.F. Antonelli, Jr. to attempt to justify Respondent Lyon's entitlement to half of the proceeds of the sale] . . . . I think that's just a lie.

(App. 170) (emphasis added). Although the District Court later expressed a clear desire to apply the doctrine of *in pari delicto*, apparently to avoid the inescapable box that it had created for itself by its two *sua sponte* rulings on the eve of trial and to avoid granting relief to Respondent Lyon, the District Court concluded that "under the law of Maryland, I can't apply the rule of *in pari delicto* based on perjury by [Respondent] Lyon or otherwise" (App. 23-24).

On May 16, 2001, after moving unsuccessfully in the District Court for a new trial and for reconsideration (App. 17), Petitioner Campbell filed a timely notice of appeal to the Fourth Circuit (App. 112). The issues on appeal (as also argued in Petitioner Campbell's Motion for New Trial and for Reconsideration) concerned, *inter alia*, the prejudice to Petitioner Campbell as a result of the District Court's *sua sponte* ruling on the eve of trial that the cause of action to be tried would be Imposition of a Constructive Trust and the appropriateness of awarding almost one million dollars to Respondent Lyon notwithstanding a finding that Respondent Lyon had committed perjury (App. 113-143). The issues were briefed and oral argument was held in the Fourth Circuit on February 28, 2002 (App. 1).

On March 28, 2002, the Fourth Circuit issued an unreported per curiam Opinion, affirming the District Court's determination that Petitioner Campbell had failed to meet his burden of proof at trial and that the District Court did not abuse its discretion in not denying Respondent Lyon relief on account of his perjury (App. 1-11). On April 11,

2002, Petitioner Campbell timely filed a Petition for Rehearing with a Petition for Rehearing *En Banc*, which was denied by the Fourth Circuit on April 23, 2002 (App. 99-111). This Petition for Writ of Certiorari followed.

ARGUMENT

The District Court and the Fourth Circuit violated Petitioner Campbell's due process rights under the Fifth Amendment to the United States Constitution and otherwise departed so far from the acceptable course of judicial proceedings that this Court should exercise its supervisory power. As explained herein, the District Court's judgment, as affirmed by the Fourth Circuit, was premised upon a cause of action for the Imposition of a Constructive Trust that was never pled by Respondent Lyon. Rather, that cause of action was first asserted by the District Court, *sua sponte*, less than one business day before the commencement of trial and over two years after the District Court had denied Respondent Lyon's Motion to File a Second Amended Complaint on the grounds that the belated amendment would unfairly prejudice the defendants – a decision affirmed in a prior ruling of the Fourth Circuit (App. 75-83). This eleventh hour ruling by the District Court prejudiced Petitioner Campbell by, *inter alia*, (i) shifting and elevating the burden of proof at trial from Respondent Lyon to Petitioner Campbell and (ii) vitiating the presumptions previously afforded to Petitioner Campbell in the case by the business judgment rule -- both of which Petitioner Campbell had relied upon when conducting discovery and preparing for trial. This untenable and inequitable result was compounded by the fact that the District Court, which presided over the trial as a court of equity, awarded Respondent Lyon nearly one million dollars even after finding that Respondent Lyon and one of his witnesses had committed perjury.

I. THE DISTRICT COURT'S *SUA SPONTE* RULINGS ON THE EVE OF TRIAL, AS AFFIRMED BY THE FOURTH CIRCUIT, PREJUDICED PETITIONER CAMPBELL AND VIOLATED HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION.

The District Court's *sua sponte* rulings on the eve of trial, compelling Petitioner Campbell to proceed to trial on the cause of action of Imposition of a Constructive Trust, which had never been pled by Respondent Lyon and which was actually objected to by Respondent Lyon when the District Court first raised it, violated Petitioner Campbell's due process rights under the Fifth Amendment to the United States Constitution. Petitioner Campbell was denied reasonable notice and a meaningful opportunity to respond to the new legal theory. Moreover, Petitioner Campbell's objection prior to trial, *i.e.*, that he would be prejudiced by the shift in the burden of proof and the unavailability of the presumptions afforded to him previously under the business judgment rule, was borne out in the District Court's final decision (App. 41-42, 177-178). The District Court afforded Petitioner Campbell no opportunity whatsoever to obtain the witnesses or documents necessary to meet the new, heightened burden of proof foisted upon him in the proverbial eleventh hour.

The prejudice suffered by Petitioner Campbell is real. As discussed *supra* in the Statement of the Case, the District Court began to rule in favor of Petitioner Campbell until Respondent Lyon's counsel interrupted to advise the District Court, as Petitioner Campbell's counsel did prior to the start of the trial, that one of the affects of the District Court's *sua sponte* rulings was to shift the burden of proof to Petitioner Campbell (App. 177-178). The District Court, after reviewing applicable case law, agreed and, then, proceeded to impose a constructive trust upon Petitioner Campbell for nearly one million dollars (App. 37).

The actions of the District Court described herein, as affirmed by the Fourth Circuit, were violative of Petitioner Campbell's Fifth Amendment due process rights. Due process requires notice and an opportunity to be heard. *See Lachance v. Erickson*, 522 U.S. 262, 266, 118 S. Ct. 753, 139 L. Ed. 2d 695 (1998). "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) (*quoting Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965) (emphasis added)). Moreover, as this Court stated in *Standard Oil Co. v. Missouri*, 224 U.S. 270, 281-82, 32 S. Ct. 406, 56 L. Ed. 760 (1912), such notice and opportunity to be heard:

> should correspond, and that the relief granted should be appropriate to that which had been heard and determined on such notice . . . .
>
> "Though a court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will . . . . The judgments mentioned, given in the cases supposed, would not be merely erroneous,

> they would be absolutely void, because the court, in rendering them, would transcend the limits of its authority in those cases."

Id. at 281-82 (*quoting Windsor v. McVeigh*, 93 U.S. 274, 282, 23 L. Ed. 914, 917 (1876)).

More recently, in *Armstrong Cork Co. v. Lyons*, 366 F.2d 206 (11th Cir. 1966), a trial judge ordered an amendment to the pleadings to conform to the jury verdict. The trial court's action in *Armstrong* had the affect of adding a new legal theory at a time when the defendant was not in a position to contest it. Notwithstanding that fact, the trial judge permitted the plaintiff to recover on that new theory; a theory which, as in Petitioner Campbell's case, "did not occur to anyone but the court." *Id.* at 210 (emphasis added).

The Appellate Court in *Armstrong* summarized the fundamental principles implicated by the trial court's *sua sponte* ruling as follows:

> Unless the parties in interest are in court and have voluntarily litigated some issues not within the pleadings, the court can consider only the issues made by the pleadings, and the judgment may not extend beyond such issues nor beyond the scope of the relief demanded. A party is no more entitled to recover upon a claim not pleaded than he is to recover upon a claim pleaded but not proved. The forgoing rules are fundamental and state nothing more than the essentials of due process and of fair play.

Id. at 208 (*quoting Sylvan Beach v. Koch*, 140 F.2d 852, 861-62 (8th Cir. 1944) (emphasis added)). The Appellate Court in *Armstrong* vacated the trial court's judgment, noting that if the court was determined to permit the amendment it "should have . . . granted Armstrong whatever reasonable

time as would have been necessary to properly prepare for and make its defense . . . ." *Id.* at 209-210. The District Court in Petitioner Campbell's case should have done no less.

Similarly, the Fourth Circuit found a *sua sponte* amendment of a complaint by a trial court to be improper in *Aiken County v. BSP Division of Envirotech Corp.*, 866 F.2d 661 (4th Cir. 1989). In *Aiken County*, the district court amended Aiken's complaint after the close of evidence to include a direct claim against Davis & Floyd, a third party defendant in the case, and ruled in favor of Davis & Floyd. *See id.* at 664. On appeal, the Fourth Circuit held that "no rationale of liberality can justify the district court's action *sua sponte* amending Aiken's complaint, and because we find that it abused its discretion in doing so, we hold that the attempted amendment was ineffective." *Id.* at 668.

In addition, in *Deere & Co. v. Johnson*, 271 F.3d 613 (5th Cir. 2001), in which the plaintiff filed suit to recover under contract and warranty causes of action, Deere & Co. moved to amend the pleadings following a jury verdict so as to allow for a recovery under a quantum meruit theory. *See id.* at 622. The trial court permitted the amendment, and entered judgment in favor of the plaintiff on the newly added theory. *See id.* However, like in Petitioner Campbell's case, prior to the amendment, "neither party mentioned, even in a whisper, quantum meruit . . . ." *Id.* at 622. On appeal, the Appellate Court reversed the judgment of the district court, stating:

> the amendment of the pleadings to state a quantum meruit claim implicates the due process clause. If Johnson had been put on notice about this claim before trial, he would have had an opportunity to offer evidence to negate Deere's contention . . . .

Id. at 622-23 (emphasis added). The Appellate Court in *Deere & Co.* concluded that the defendant's procedural due

process rights had been violated and, consequently, that the trial court had abused its discretion in allowing the belated amendment. *See id.*

Although the amendments to the causes of action in *Armstrong, Deere & Co.*, and *Aiken County* were either imposed by the trial courts *sua sponte* or permitted on motion after the presentation of evidence, it is respectfully submitted that a defendant's procedural due process rights are also violated when an amendment is imposed by the trial court on the eve of trial, such as the District Court did in Petitioner Campbell's case. Indeed, in Petitioner Campbell's case, discovery had been closed for over two years by the time the District Court ordered that the case proceed to trial on a cause of action for Imposition of a Constructive Trust. As in *Armstrong*, however, that cause of action did not occur to anyone but the District Court. By the time it "occurred" to the District Court in Petitioner Campbell's case, moreover, the trial was less than one business day away and motions to dismiss and for summary judgment had already been briefed, argued and ruled upon in two federal courts. At no time during that three-year period did either of the two federal courts or any of the four parties even whisper "constructive trust." Clearly, Petitioner Campbell had neither reasonable notice nor a reasonable opportunity to be heard when the District Court first stumbled upon that theory one business day before trial in its desperate effort to unscramble the mess it created by its last minute, *sua sponte* rulings.

The decision of the Tenth Circuit in *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1090-91 (10th Cir. 1991), is instructive. In *Evans*, a plaintiff attempted to change her theory in a discrimination case from a retaliatory discharge claim to a failure to hire claim two weeks before the scheduled trial date. *See id.* at 1091. The district court refused to allow the new theory and the Tenth Circuit affirmed, stating:

> We do not believe . . . that the liberalized pleading rules permit plaintiffs to wait until the last minute to ascertain and refine the theories on which they intend to build their case. This practice, if permitted, would waste the parties' resources, as well as judicial resources, on discovery aimed at ultimately unavailing legal theories and would unfairly surprise defendants, requiring the court to grant further time for discovery or continuances.

Id. at 1091 (emphasis added); *see also Gulf Oil Trading Co. v. M/V Carbi Mar*, 757 F.2d 743, 751-52 (5th Cir. 1985)(holding that the district court properly denied plaintiff's attempt to add a new theory of recovery three weeks before the start of the scheduled trial). It follows, *a fortiori*, that, if it is unconstitutional for a plaintiff to wait until the last minute to ascertain and refine theories on which he intends to build his case, it is also unconstitutional for a judge, like the District Court in Petitioner Campbell's case, to do so *sua sponte* at the last minute.

As a result of the District Court's actions, as affirmed by the Fourth Circuit, Petitioner Campbell suffered the exact prejudice referred to recently by this Court in *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 120 S. Ct. 1579, 146 L. Ed. 2d 530 (2000). In *Adams*, this Court noted that "due process does not countenance . . . swift passage from pleading to judgment in the pleader's favor." *Id.* at 465 (emphasis added). Yet that is exactly what happened in Petitioner Campbell's case. The District Court *sua sponte* ordered the trial to proceed on the District Court's new theory less than one business day before the start of the trial and, less than 36 hours after the commencement of the trial, judgment was entered against Petitioner Campbell on that very theory. It is respectfully submitted that such conduct on the part of the District Court, as affirmed by the Fourth Circuit, does

not even come close to the requirements of notice, opportunity to be heard and fair play that are inherent in the Due Process Clause of the Fifth Amendment to the United States Constitution.

II. THE DISTRICT COURT'S JUDGMENT, AS AFFIRMED BY THE FOURTH CIRCUIT, ABROGATES WELL ESTABLISHED MARYLAND LAW REGARDING ACTIONS BY STOCKHOLDERS AND, AS SUCH, CONSTITUTES PLAIN ERROR.

The District Court's judgment, as affirmed by the Fourth Circuit, vitiates each of the well-established legal principles annunciated by the Maryland Court of Appeals over 50 years ago in *Waller v. Waller*, 49 A. 2d 449 (Md. 1946). As a result, the decision in *Waller*, as adopted previously by the Fourth Circuit, has been rendered utterly meaningless. It is respectfully submitted that such a dramatic departure from the fundamental principles establishing whether and when a stockholder has standing to sue individually constitutes "plain error."[2]

In *Waller*, a plaintiff-shareholder in a small corporation sued a defendant-stockholder/director on the grounds that the defendant had made certain decisions in a deliberate effort to diminish the value of the plaintiff's stock in that corporation, to force him and the corporation into bankruptcy, and to seize control of the corporation they jointly owned. *See id.* at 451. The Maryland Court of

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2 This Court has stated that it will not defer to lower courts on state-law issues if there is a showing of '"plain error;' *Palmer v. Hoffman*, 318 U.S.109, 118, 63 S. Ct. 477, 482, 87 L. Ed. 645 (1943); the view of the lower court is 'clearly wrong,' *The Tungus v. Skovgaard*, 358 U.S. 588, 596, 79 S. Ct. 503, 508, 3 L.Ed.2d 524 (1959); . . .'clearly erroneous,' *United States v. Durham Lumber Co.*, 363 U.S. 522, 527, 80 S. Ct. 1282, 1285, 4 L.Ed2d 1371 (1960), or 'unreasonable,' *Propper v. Clark*, 337 U.S. 472, 486-487, 69 S. Ct. 1333, 1340-1341, 93 L. Ed. 1480 (1949)." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 n.9, 105 S. Ct. 2794, 2800 n.9, 86 L.Ed.2d 394 (1985).

Appeals determined that, regardless of the intent of the defendant-director/shareholder, in a suit against that director/shareholder for acts that resulted in a diminution in value of stock of the corporation, a stockholder may only sue derivatively inasmuch as the cause of action belonged to the corporation and not to the individual stockholder. *See id.* at 452.

It is well recognized that *Waller* is still the law in Maryland. It has been reaffirmed repeatedly by state and federal courts alike,[3] moreover, for, *inter alia*, the following propositions:

- "Where directors commit a breach of trust, they are liable to the corporation, not to its creditors or stockholders, and any damages recovered are assets of the corporation, and the equities of the creditors and stockholders are sought and obtained through the medium of the corporate entity." *Waller*, 49 A.2d at 452.

- "The rule is applicable even when the wrongful acts were done maliciously with intent to injure a particular stockholder." *Id.* at 452.

- "[U]pon failure of a corporation to institute or prosecute suit against an officer for breach of trust, a court of equity in a proper case will allow suit to be brought and maintained by any stockholder for the benefit of the corporation. Such cases usually arise

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[3] *See, e.g., Twenty Seven Trust v. Realty Growth Investors*, 533 F. Supp. 1028, 1039 n.22 (D. Md. 1982); *Werbowsky v. Collumb*, 766 A.2d 123, 136 (Md. 2001); *Danielewicz v. Arnold*, 769 A.2d 274 (Md. Ct. Spec. App. 2001)(discussed *infra*).

where the directors own or control a majority of the shares of stock, perpetuate themselves in authority, and defy the minority, and thus the stockholders would be without remedy unless the court interposed its aid." *Id.* at 453 (citations omitted).

- "[D]irectors occupy a fiduciary relation to the corporation and all its stockholders, but they are not trustees for the individual stockholders." *Id.* at 454.

The Fourth Circuit has long embraced and applied the decision of the Maryland Court of Appeals in *Waller*. The Fourth Circuit, by way of example, adopted the rationale of *Waller* in *Armstrong v. The Frostie Co.*, 453 F.2d 914 (4th Cir. 1971) and in *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311 (4th Cir. 1994). The Fourth Circuit's decision in this case, however, is in direct conflict with its decisions in *Armstrong* and *Smith Setzer*.

In *Armstrong*, for example, the plaintiff alleged that he had been a substantial stockholder in Beverage Capital Corp., which was engaged in bottling and distributing soft drinks in Maryland, that approximately 40 percent of its product was sold as Frostie Root Beer under a franchise granted by The Frostie Co., but that Frostie wrongfully canceled the franchise. *Armstrong*, 453 F.2d at 915. The plaintiff in *Armstrong* also alleged that Beverage sued Frostie because of the cancellation of the franchise but that, before trial, he was forced to sell his stock to avert financial disaster. *See id.* at 915-16. The plaintiff further contended that the purchaser of the stock, fraudulently conspiring with Frostie and others, caused Beverage to settle the suit on terms advantageous to Frostie. *See id.* The Fourth Circuit, citing *Waller*, held that, where a cause of action arises from conduct of the directors and/or officers of a corporation, the

only proper plaintiff is the corporation itself. Referring specifically to *Waller*, the Fourth Circuit stated that "[i]ts holding on these issues is unequivocal" *See id.* at 916.

In *Smith Setzer*, a plaintiff-shareholder personally sued the South Carolina Procurement Review Panel ("SCPRP"). The plaintiff-shareholder alleged that, as a shareholder of the corporation, the corporation's loss of revenue and earnings on account of actions of the SCPRP was a loss of income to him as well. The Honorable William B. Traxler, Jr., then of the United States District Court for the District of South Carolina, dismissed the claim. The Fourth Circuit, affirming the decision of Judge Traxler below, held that "[i]t is considered a 'fundamental rule' that '[a] shareholder -- even the sole shareholder -- does not have standing to assert claims alleging wrongs to the corporation." *Smith Sezter*, 20 F.3d at 1316 (citations omitted and emphasis added).

In this case, as discussed more fully in the Statement of the Case, Respondent Lyon, who had no ownership interest in L-C itself, asserted that he was entitled to one-half of the proceeds of the sale of L-C's property on account of his 50% ownership interest in ICE, a separate corporate entity which, in turn, owned L-C. Respondent Lyon's entire claim rested on his 50% stock interest in ICE, and his sole assertion was that the defendants, as directors of L-C and not of ICE, breached a fiduciary duty allegedly owed to Respondent Lyon, in his capacity as a shareholder of ICE and not of L-C, by failing to pay Respondent Lyon a share of the proceeds derived from the sale of L-C's asset. Such an action is directly at odds with *Waller* and its progeny.

Even if the principles in *Waller* were ever in doubt, the Maryland Court of Special Appeals certainly erased any such arguable speculation in *Danielewicz v. Arnold*, 769 A.2d 274 (Md. Ct. Spec. App. 2001). *Danielewicz* involved a small,

minimal shareholder corporation. The Maryland Court of Special Appeals wholeheartedly endorsed the *Waller* analysis as Maryland law, noting, of special interest here, "the rule is applicable even when the wrongful acts were done maliciously with intent to injure a particular stockholder." *Danielewicz*, 769 A.2d at 283. The Maryland Court of Special Appeals aptly summarized the defendant's pleadings in *Danielewicz* as follows:

> Petitioner also avers that Diane Arnold and George Arnold breached their fiduciary duties of loyalty, disclosure, and good faith to Petitioner when they participated in and consented to the August 1987 transaction that diluted Petitioner's interest in AFS and achieved a shift in the controlling interest in AFS from Petitioner to George Arnold (and ultimately to Diane Arnold following George's death) . . . . The Court's decision in *Waller* is dispositive of the present case on the issue of Petitioner's standing to sue in a capacity as an individual stockholder.

Id. at 285 (emphasis added). Similarly, the court's decision in *Waller* also should have been dispositive of Respondent Lyon's standing to bring a direct action against Petitioner Campbell and the other defendants.

A departure, such as the one here, from these well-established legal principles will have a direct and substantial impact on the nature and volume of claims brought by plaintiff-shareholders in the trial courts of the Fourth Circuit and all other jurisdictions applying the principles annunciated in *Waller*. Indeed, the interpretation and application of *Waller* by the District Court and the Fourth Circuit in this case, if allowed to stand, alter dramatically the entire landscape of Maryland law on these issues, if not corporation law across the country. The policy

implications of such a decision, moreover, particularly in these times of wide-spread and highly publicized corporate misconduct, cannot be overstated. This Court has an opportunity to be proactive in establishing the framework in which the next great wave of litigation in this country will take place, and Petitioner Campbell respectfully urges that it do so.

III. RESPONDENT LYON'S PERJURY SHOULD HAVE BARRED HIS RECOVERY OF NEARLY ONE MILLION DOLLARS FROM A COURT OF EQUITY.

The District Court, sitting as a court of equity, unequivocally found that Respondent Lyon and his principal witness, D. F. Antonelli, Jr., committed perjury in this case when they testified that Respondent Lyon had paid an outstanding corporate debt that encumbered L-C's property. The District Court stated:

> I don't believe for a minute that he [Respondent Lyon] paid [Petitioner] Campbell's half [referring to the false testimony of Respondent Lyon and D.F. Antonelli, Jr. to attempt to justify Respondent Lyon's entitlement to half of the proceeds of the sale] . . . . I think that's just a lie.

(App. 170) (emphasis added). It is respectfully submitted that it was an abuse of discretion for the District Court, as affirmed by the Fourth Circuit, to proceed to award Respondent Lyon nearly one million dollars in light of his perjury.

The perjured testimony of Respondent Lyon and Mr. Antonelli was first perpetrated before the District Court and the Fourth Circuit in connection with Respondent Lyon's earlier appeal to set aside the District

Court's entry of summary judgment in favor of Petitioner Campbell. As discussed *supra*, Respondent Lyon had moved to file a Second Amended Complaint shortly before the close of discovery (App. 94, 211-221). As part of that motion, Respondent Lyon attached affidavits from himself and Mr. Antonelli, both of which averred that Respondent Lyon had paid the corporate debt (App. 142-143). The Fourth Circuit, accepting those false statements as true, actually based its reversal of the District Court's award of summary judgment in favor of Petitioner Campbell on those false statements. The Fourth Circuit held in the earlier appeal that:

> Lyon has proffered sufficient evidence to rebut this presumption. Lyon proffers at least the following: (1) the L-C directors would not provide Lyon with information about what happened to all of the proceeds from the Oxen Cove sale, (2) Campbell admitted that he would not communicate with Lyon (or his representative) about the sale, and (3) although Campbell claims he was entitled to reimbursement for his payment of certain notes guaranteed by him and Lyon, the holder of the notes [Mr. Antonelli] says that they were paid off -- on a 50-50 basis by Lyon and Campbell -- well before the Oxen Cove sale.

(App. 82) (emphasis added).

Following the Fourth Circuit's ruling in the first appeal, the subject affidavits became the groundwork for the perjury of Respondent Lyon and Mr. Antonelli at trial. The perjury, moreover, as is evident from the Fourth Circuit's decision, directly related to Petitioner Campbell's defense at trial that Petitioner Campbell was a legitimate creditor of L-C and that it was proper for the

L-C Board of Directors to repay Petitioner Campbell, and not Respondent Lyon, from the proceeds of the sale of L-C's property (App. 115-118, 122).

Respondent Lyon's inequitable conduct, culminating in the perjury at trial, should have been a bar to granting Respondent Lyon any relief, equitable or otherwise. The District Court clearly stated it would have done so if it thought it would have been proper pursuant to applicable law and the Fourth Circuit's prior opinion in this case (App. 23-24). Petitioner Campbell respectfully suggests that it was not only permissible for the District Court to deny Respondent Lyon relief on account of his perjury, but it was an abuse of discretion not to do so.

The decision of the United States District Court for the District of Maryland in *Green v. Mayor and City Council of Baltimore*, 198 F.R.D. 645 (D. Md. 2001) is illustrative. In *Green*, a case dealing with the filing of false notarizations at the summary judgment stage, the district court stated that:

> The prejudice to the integrity both of the process of adjudication in general and of this Court in particular, which relies on the trustworthiness of those who submit – not to mention notarize – affidavits, is manifest. The public interest in preserving the trustworthiness of sworn documents as part of the process of orderly adjudication demands that the strongest means available be taken to redress the situation in this particular case and to deter similar misconduct by others.

Id. at 647. The *Green* case was dismissed for the *attempt* to perpetrate a fraud on the court. Here, Respondent Lyon *actually* committed perjury in *two* federal courts and, as such, he should not be permitted to profit to the tune of almost one million dollars.

Indeed, there is ample precedent for denying a claimant relief where he/she has engaged in misconduct such as perjury, discovery abuse, fabrication of evidence and the like. For example, in *Smith v. Cessna Aircraft Co.*, 124 F.R.D. 103 (D. Md. 1989), a case in which a claim for lost wages was dismissed because the plaintiff had manufactured false tax documents and committed perjury in support of the claim, the court held:

> "He who comes into equity must come with clean hands." As traditionally applied in courts of equity, this maxim is a "self imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of defendant."

Id. at 105 (citations omitted).

The seriousness of committing perjury at trial, on an issue central to the legitimacy of one's claim or to an opposing party's defense, is underscored by the legion of cases in which claims have been dismissed at the *pre-trial* stage for discovery abuse and similar violations. *See, e.g., Valley Engineers, Inc. v. Electric Engineering Co.*, 158 F.3d 1051 (9th Cir. 1998) (action dismissed due to plaintiff's failure to produce key document); *Marrocco v. General Motors Corp.*, 966 F.2d 220 (7th Cir. 1992) (first case dismissed for destruction of evidence which occurred despite court order; second case judgment on liability entered for

plaintiff because loss of evidence was fault of defendant even though not willful or deliberate); *White v. Office of the Public Defender*, 170 F.R.D. 138 (D. Md. 1997) (action dismissed for destruction of evidence during litigation); *Rogler v. Phillips Building Mental Retardation Program*, 126 F.R.D. 509 (D. Md. 1989) (action dismissed because plaintiff made a mockery of discovery, refused to comply with court orders and engaged in dilatory tactics); *Aerodyne Systems Engineering, Ltd. v. Heritage Int'l Bank*, 115 F.R.D. 281 (D. Md. 1987) (case dismissed for history of delaying litigation, refusal to respond to discovery despite court order, responses finally given were inappropriate and inadequate); *Snead v. Automation Industries, Inc.*, 102 F.R.D. 823 (D. Md. 1984) (dismissal appropriate where plaintiff repeatedly engaged in evasive discovery tactics and dilatory conduct).

In this case, contrary to the weight of authority, Respondent Lyon not only was not penalized for his commission of perjury, he was paid handsomely for it. It is respectfully submitted that such a result departs so far from the acceptable and usual course of judicial proceedings that this Court should exercise its supervisory powers. Petitioner Campbell respectfully requests that the Court do so.

CONCLUSION

Petitioner Larry A. Campbell respectfully submits that the questions presented herein merit consideration by this Court. Petitioner Larry A. Campbell respectfully requests, therefore, that a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be issued to review the decisions below.

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHN W. LYON,
Plaintiff-Appellee,

v.

No. 01-1694

LARRY A. CAMPBELL,
Defendant-Appellant,

and

EDWARD W. STORKE;
ROBERT B. COOK,
Defendants.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frederic N. Smalkin, Chief District Judge.
(CA-98-1129-S)

Argued: February 28, 2002
Decided: March 28, 2002
[Entered: March 28, 2002]

Before WILKINSON, Chief Judge, and NIEMEYER and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Gerard Patrick Martin, MARTIN, SNYDER & BERNSTEIN, P.A., Baltimore, Maryland, for Appellant. David Schertler, COBURN & SCHERTLER, Washington, D.C., for Appellee. **ON BRIEF:** Steven F. Wrobel, MARTIN, SNYDER & BERNSTEIN, P.A., Baltimore, Maryland; Thomas J. Zagami, HODES, ULMAN, PESSIN & KATZ, P.A., Towson, Maryland, for Appellant. Barry Coburn, COBURN & SCHERTLER, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

John Lyon sued Larry Campbell, his former business partner, claiming that Campbell breached his fiduciary duty to Lyon by retaining for himself the entire proceeds from a sale of property owned by a corporation in which the two men were equal, 50 percent shareholders. Initially, the district court granted summary judgment to Campbell based on the business judgment rule and the doctrine of unclean hands. Lyon appealed, and we reversed and remanded for further proceedings. On remand, the district court held a two-day bench trial, found that Campbell had breached his fiduciary duty, and imposed a constructive trust on the proceeds of the sale. Campbell now appeals, arguing that the district court erred in finding a breach of fiduciary duty and that in no event is Lyon entitled to equitable relief because he has unclean hands. We affirm the judgment awarded to Lyon.

I.

Lyon and Campbell became business partners sometime around the early 1970s. Sometime in the 1980s their business relationship began to deteriorate, and for years now the two have been invoking the jurisdictions of various state and federal courts in their efforts to complete their messy split up. See, e.g., *Campbell v. Lyon*, 26 Fed. Appx. 183 (4th Cir. 2001) (per curiam); *Lyon v. Campbell*, 1994 WL 369453 (4th Cir.) (per curiam); *Lyon v. Campbell*, 596 A.2d 1012 (Md. 1991); *Lyon v. Campbell*, 707 A.2d 850 (Md. Ct. Spec. App. 1998). At trial the district court was faced with the unenviable task of sorting out 15 years of alleged debts, debt repayments, and business transactions, many of which were unsupported by proper documentation. The court then sought to apply the various doctrines of corporate law to those facts it could discern. As the district court noted, Lyon and Campbell behaved like "people in kindergarten in terms of observing [corporate] formalities," and thus reconstructing the legal relationships and liabilities between the two is "sort of like trying to rebuild the Titanic, [an] analogy. . . chosen for a reason, from a deck chair and a billiard table." With this introduction, we turn to the facts of this case.

Lyon and Campbell were equal, 50 percent shareholders in, among other things, a corporation called ICE. ICE, in turn, was a holding company for other Lyon-Campbell ventures, two of which were L-C, Inc. and Excavation Corporation, Inc. (EC). Through L-C, Lyon and Campbell purchased a parcel of property known as Oxen Cove in 1972 for around $500,000. The Oxen Cove property was an 80-acre tract of land located partially in Maryland and partially in the District of Columbia. During the 1970s EC had taken out various bank loans. Lyon and Campbell had personally guaranteed these loans, and L-C's Oxen Cove property was pledged as a security interest on the loans. When EC went bankrupt, Dominic Antonelli, a

business associate of Lyon, agreed to purchase the notes for these loans from the bank. At trial Lyon and Antonelli both testified that between 1984 and 1990 Lyon paid Antonelli the entire amount owed on the EC debt. The two testified that Campbell was kept in the dark about this repayment because Antonelli planned to seek repayment from Campbell of half of the debt and then return that money to Lyon. Campbell claims that Lyon never paid Antonelli anything, and indeed neither Lyon nor Antonelli were able to produce any documentary evidence of Lyon's repayment of the loan. In fact, they admitted that Antonelli had not even canceled the notes, but they attributed this failure to simple carelessness. In 1990 an associate of Campbell, Joel Broyhill, paid Campbell's one-half share of the loan to Antonelli on Campbell's behalf, and Antonelli assigned the notes to Broyhill.

As noted above, business relations between Lyon and Campbell eventually became strained, and they began the long process of extricating themselves from their various ventures. By 1995 the two men had ceased their joint business ventures except for their continued co-ownership of ICE. The only significant remaining asset at this point was the Oxen Cove property, still held by ICE's subsidiary, L-C. In early 1995 Lyon was approached by a representative of the Corrections Corporation of America (CCA) about purchasing the Oxen Cove property. Lyon relayed this information to L-C's board of directors, which consisted of himself, Campbell, and Edward Storke. In order to free up Oxen Cove for a potential sale, Campbell repaid Broyhill the amount Broyhill had paid on the Antonelli debt, and in 1996 Broyhill released the Oxen Cove property from the security interest he held as owner of the EC debt.

L-C eventually sold Oxen Cove to CCA for $4 million. Prior to the sale Campbell and Storke discovered that Lyon had pledged $1 million of his share of any proceeds from a potential Oxen Cove sale to his bankruptcy

trustee. Because of this conflict of interest, Campbell and Storke voted to remove Lyon from the L-C board and replace him with Robert Cook. Campbell and the other L-C board members proceeded to freeze Lyon out of the Oxen Cove negotiations and eventual sale, refusing to provide him with information related to the sale. Several days before the sale the L-C directors agreed to pay $1 million of any sale proceeds to Lyon's bankruptcy trustee to settle all claims the trustee might have had against L-C and Oxen Cove. After the sale the board distributed $1 million of the proceeds to the bankruptcy trustee and the remainder to Campbell; the distribution to Campbell was supposedly to reimburse him for his personal payment of the EC debt.

Lyon brought this diversity action in federal court against Campbell for breach of fiduciary duty, claiming that the sale proceeds should have been distributed equally between the two of them as equal shareholders in ICE. The district court granted summary judgment to Campbell on the basis of the business judgment rule. We reversed and remanded, explaining that the evidence created a factual dispute as to whether Campbell had breached his fiduciary duty. On remand the district court noted for the first time that Lyon had failed to properly certify his complaint pursuant to Fed. R. Civ. P. 23.1 and thus could not maintain a shareholder derivative action. "[B]efore a stockholder will be permitted to maintain a suit for injury to the corporation, he must allege and prove that he requested the directors to institute suit in the name of the corporation, and they refused." *Waller v. Waller*, 49 A.2d 449, 453 (Md. 1946). Rule 23.1 establishes the procedures necessary to properly allege such a request and refusal. Lyon conceded that he had not met the requirements of Rule 23.1, and thus he could not maintain a shareholder derivative suit. The district court then proceeded to a bench trial solely on a direct breach of fiduciary duty claim. The court found a breach of fiduciary duty by Campbell and imposed a constructive trust on the proceeds of the Oxen Cove sale. Campbell now appeals. We

review the district court's factual findings for clear error and its legal conclusion *de novo*. *Anita's New Mexico Style Mexican Food, Inc. v. Anita's Mexican Foods Corp.*, 201 F.3d 314, 316 (4th Cir. 2000).

II.

Because Lyon cannot maintain a shareholder derivative suit against Campbell, we must first determine whether he can maintain some sort of direct claim for breach of fiduciary duty. If he can, we must then determine whether the district court property placed the burden on Campbell to justify the fairness of the distribution of the proceeds and whether Campbell in fact met such a burden. We address these issues in turn. The parties agree that Maryland law applies.

As a preliminary matter we address Campbell's claim that he suffered unfair surprise and prejudice because the district court at the last minute transformed Lyon's breach of fiduciary duty claim into a claim for imposition of a constructive trust. A constructive trust is an equitable remedy, not a cause of action in and of itself. See 21 Maryland Law Encyclopedia Trusts S 61 (1997) ("A constructive trust . . . is a mere remedy to which equity courts resort in granting relief."). It is true that in its pretrial order the district court characterized the cause of action for trial as that of "Imposition of a Constructive Trust." However, in its oral ruling the district court explained that "the appropriate remedy for breach of fiduciary duty [between shareholders], in such circumstances, is . . . the imposition of a constructive trust." We conclude that despite any confusion created by the pretrial order, the district court properly tried the case based on the cause of action of breach of fiduciary duty and then imposed the remedy of a constructive trust. Campbell's argument that the district court allowed the case to be tried on an improper theory is therefore misplaced.

A.

Ordinarily, Lyon's failure to properly plead a shareholder derivative claim would be the end of his breach of fiduciary duty claim. However, Maryland has recognized that in certain circumstances, shareholders in a small, closely held corporation owe each other a fiduciary duty apart from the fiduciary duty owed by the directors to the corporation. *See Toner v. Baltimore Envelope Co.*, 498 A.2d 642, 647 (Md. 1985). Here, ICE and L-C were small, closely held corporations with only two shareholders, Lyon and Campbell. The shareholders served on the board of directors and participated in the day-to-day management of corporate affairs, often disregarding corporate formalities in the course of such management. Additionally, at the time of the Oxen Cove sale Campbell had achieved de facto control over the corporation. Following Lyon's removal from the L-C board, Campbell and the other directors refused to give Lyon any information or allow him any input regarding the Oxen Cove sale, effectively freezing Lyon out of L-C's affairs. Under these circumstances, Campbell, in his capacity as shareholder, owed his co-shareholder Lyon a fiduciary duty. *See id.* at 647-52; *Cooperative Milk Service Inc. v. Hepner*, 81 A.2d 219, 224 (Md. 1951); see also *Donahue v. Rodd Electrotype Co. of New England*, 328 N.E.2d 505 (Mass. 1975). Accordingly, Lyon can maintain a breach of fiduciary duty claim against Campbell.

B.

In most cases the burden of establishing a breach of fiduciary duty lies with the party asserting the breach, in this case Lyon. However, "transactions between a corporation and its officers or directors are always closely scrutinized." *Lynch v. Buchanan*, 377 A.2d 592, 596 (Md. Ct. Spec. App. 1977). Significantly, when a director or officer enters into a contract or transaction with the corporation such that his or her personal interest differs from that of the corporation, "the burden of proving that the contract is fair,

adequate and equitable is upon the officer or director." *Chesapeake Constr. Corp. v. Rodman*, 261 A.2d 156, 158 (Md. 1970). This principle applies to dominant shareholders as well as to officers and directors. Lynch, 377 A.2d at 595. The burden of proving fairness shifts to the "director or shareholder once it is shown that he has dealt in a way to perfect his own interest." Id. In this case the district court found that once Lyon had been frozen out of L-C's dealings, Campbell became the de facto controlling shareholder and effectively dominated the L-C board. It is undisputed that the board distributed about three-fourths of the proceeds of the Oxen Cove sale directly to Campbell. In this situation, Campbell, the recipient of these proceeds, clearly faced a conflict between his own personal interests and those of the corporation. Because Campbell, acting as de facto controlling shareholder, caused the corporation to distribute the Oxen Cove sale proceeds to him at a time when he dominated the board, he bears the burden of proving that this self-interested transaction was fair and equitable. To establish this, Campbell must show that he was a bona fide creditor of L-C and thus was entitled to payment prior to the distribution of the proceeds to the shareholders, namely himself and Lyon.

At the time the board distributed the Oxen Cove sale proceeds to Campbell, the board justified the distribution as a repayment of money owed Campbell by L-C. Campbell concedes that there is no clear documentary evidence proving that L-C owed him anything. Before the district court and on appeal Campbell explains the source of this supposed obligation as follows. As mentioned above, L-C's property, Oxen Cove, was pledged as a security interest for the loans taken out by EC and personally guaranteed by Campbell and Lyon. Campbell's lawyer explained that "[i]f Mr. Campbell hadn't stepped up to the plate [and paid Antonelli] . . . someone could have foreclosed on L-C's properties, taking it to satisfy the debt, and L-C wouldn't have had any property to sell in 1996." In response to a

question by the district court, Campbell's lawyer clarified that "L-C didn't owe anybody." The key, rather, was that "L-C property was pledged to secure the debts." Campbell argues that he is entitled to the proceeds of the Oxen Cove sale because if he had not paid off the debt, L-C could not have realized those proceeds.

Campbell's argument rests on a failure to understand the difference between a debt obligation and a security interest. The fact that L-C's property was subject to a security interest on the EC loan does not establish that L-C was itself liable to Campbell for paying off this loan. L-C undoubtedly benefited from the release of this security interest on its property, but this benefit does not give rise to a legal liability. When property is pledged as security for a debt, the owner of the pledged property does not thereby become liable on the debt. Likewise, while the release of the security interest benefits the owner of the pledged property, the release does not trigger any legal obligation on the part of the owner. Campbell, as a personal guarantor of EC's debt, would be entitled to reimbursement from EC for his payment of that debt. The fact that Campbell cannot recover from EC, since EC is long-since bankrupt, is of no moment. Such is the risk of personally guaranteeing a corporate debt.

Here, Campbell has proven only that L-C was subject to losing the Oxen Cove property (up to the outstanding value of the EC debt), not that L-C was liable on the loan. Accordingly, Campbell has failed to prove that he was a creditor of L-C. The district court thus concluded that Campbell failed to carry his burden as an interested party in this transaction to show "a sufficient case of justice, equity, or fairness, to allow him to retain the entire net proceeds of the Oxen Cove sale." We agree, and we affirm the district court's determination that Campbell breached his fiduciary duty to Lyon when he caused the net proceeds of the Oxen Cove sale to be distributed exclusively to himself.

III.

Aside from the merits of the case, Campbell argues that Lyon should be barred from any equitable relief based on the doctrine of unclean hands. The district court rejected this argument, and we review the court's decision not to apply the doctrine for abuse of discretion. *Hicks v. Gilbert*, 762 A.2d 986, 990 (Md. Ct. Spec. App. 2000). According to Campbell, the district court found that Lyon and Antonelli had lied when they testified that Lyon fully repaid Antonelli the EC debt. There is much evidence calling Lyon's and Antonelli's testimony into doubt. For example, Lyon's annual financial statements reflected a large debt owed to Antonelli that did not diminish over the years that Lyon supposedly paid off the EC debt. Indeed, at one point the district court commented that "I don't believe for a minute that [Lyon] paid Campbell's half. I think that's just a lie." In light of this finding of perjury, Campbell argues, the district court should have barred Lyon from any equitable relief based on the doctrine of unclean hands.

As we noted in the first appeal of this case, the doctrine of unclean hands permits a court to withhold equitable relief from a party who is guilty of "willful wrongdoing in relation to the controversy before it." *Manown v. Adams*, 598 A.2d 821, 825 (Md. Ct. Spec. App. 1991), *vacated on other grounds*, 615 A.2d 611 (Md. 1992). We explained that the doctrine applies only to willful wrongdoing that relates to the claim being litigated. We held that Lyon's failure to disclose his conflict of interest in the potential Oxen Cove sale was not sufficiently related to his breach of fiduciary duty claim to warrant application of the doctrine.

As to Lyon's trial testimony, the district court determined that any false testimony was collateral to the central issue in the case and declined to apply the doctrine of unclean hands. Campbell argues that while the willful

wrongdoing must relate to the controversy before the court, perjury during the actual trial proceedings is always a sufficient reason to apply unclean hands, regardless of whether the case ultimately turns on the subject matter of the perjury. We acknowledge that perjury during a trial proceeding may warrant different treatment than willful wrongdoing outside the judicial proceedings. Nonetheless, even if the district court might have been justified in applying the doctrine of unclean hands based on Lyon's false testimony, the court was not compelled to do so. Application of the doctrine of unclean hands is largely in the discretion of the district court, see *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 815 (1945), and the district court did not abuse its discretion by refusing to apply the doctrine here.

B

In conclusion, we affirm the district court's determination that Campbell failed to show that he was entitled to keep the net proceeds of the Oxen Cove sale. Additionally, the district court did not abuse its discretion in declining to apply the doctrine of unclean hands to bar Lyon's recovery. The judgment of the district court is therefore

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN W. LYON

V. CIVIL NO. S 98-1129

LARRY A. CAMPBELL, et al.

[Entered May 7, 2001]

MEMORANDUM OPINION

This matter is before the Court on the defendant Campbell's motion for new trial or to amend judgment, which will be summarily denied for reasons that follow. No oral hearing is needed. Local Rule 105.6, D. Md.

The defendant is quite correct that the Court found the testimony of Lyon and Antonelli, to the effect that Lyon had paid off the entire 'Antonelli debt," including Campbell's half, incredible and not worthy of belief. This, however does not amount to a fraud on the court such as that perpetrated in the case cited by the defendant, *viz., Green v. Mayor and City Council of Baltimore,* 198 FRAT 645 (D. Md. 2001) In that case, the plaintiff misused his powers as a notary public to create false exhibits by attesting that they had been sworn to before him by the alleged subscribers, who never signed the affidavits. This is quite different from false trial testimony or even untrue statements in affidavits. Thus, in the exercise of its discretion, the Court is not inclined to revisit the results of this trial on a basis that the plaintiff perpetrated a "fraud on the court."

While it is true that there was not a formal amendment to the complaint pleading a constructive trust, the identification of that theory as the appropriate theory of

the plaintiff's case here resulted largely from the defendant's own inactions and actions, so the defendant is hardly in a position to complain. First, the defendant apparently never focused on the fact that plaintiff could not maintain his state common law and statutory claims as pleaded, because of their derivative nature, until the Court took a hard look at the parties' proposed jury instructions and realized the problem, communicating it to counsel Then, the defendant made a last-minute motion for summary judgment that was the subject of an immediate oral hearing literally on the eve of trial. Although the motion was denied, because the plaintiff was not able to make an orderly response with only one day remaining until trial, the result of the hearing was the elimination of any issue for trial by jury. As best the Court can recollect, the defendant, at the hearing, did not object to the Court's identification of the relevant cause of action as a constructive trust, to be tried to the Court as equity chancellor. At that juncture, the Court canceled the jury and indicated that the matter would come on for trial the next business day on the constructive trust claim, without a jury. Again, no timely objection was made by the defendant. At the very beginning of trial on Monday morning, the defendant raised an objection to proceeding on the constructive trust theory, but was unable to articulate, to the Courts satisfaction, any prejudice, and the Court finds that his present, *post hoc* attempt to articulate prejudice is insufficient.

The fact of the matter is that, from the very day this case was filed, it has been about Mr. Lyon seeking his *pro rata* share of the proceeds of the sale of the Oxon Cove property, pure and simple. The role of the Court, at base, is to see "that substantial justice [is] done," even if there is some procedural irregularity. *See Fender v. General Elec. Co., Inc*, 380 F.2d 150, 152 (4th Cir. 1967). Even though burdens of proof are different in constructive trust cases than in some other ones, not one factual issue important to the outcome of

the trial was muddied or obscured by trying the case on a constructive trust theory, and, certainly, defendant's very competent counsel had the weekend to prepare themselves on Maryland's law on constructive trusts, which is simple and easily researched. Other than having lost on the merits, which is not prejudice in the sense requiring a new trial or amendment of the judgment, defendants have no complaint.

Turning to the issue of *pari delicto*, although the Court does not agree with the defendant's reading of *Schneider v. Schneider*, 335 Md. 500 (1994), even if the Court had the latitude to, in its role as chancellor, deny recovery to Mr. Lyon under the rule in *Schneider*, it would not do so, The fact of the matter is that the false testimony here concerned a matter that turned out to be collateral to the major issue posed in this case, which was whether - - Mr. Campbell had paid his share or all -- of the so-called Antonelli debt to Broyhill at or after the closing on the Millville Quarry property. The question of whether, as Lyon and Antonelli claim, the $2,000,000 paid by Antonelli to Lyon represented a payback of Lyon's payment of Campbell's share of the Antonelli debt is rather beside the point here, as the actual fact is that, as far as Campbell is concerned, only his <u>half</u> of the Antonelli debt was payable to Antonelli, assumed by Broyhill, and later was paid to Broyhill by Campbell. This is clearly contrary to Campbell' s argument at trial that he was entitled to keep more than his *pro rata* share of the Oxon Cove property proceeds as a payback for his having paid Lyon's share of the Antonelli debt to Broyhill, which he clearly never did.

As the Court found, and as it still is convinced, Mr. Campbell only ever paid one half of the Antonelli debt, which was his half, and it was paid to Broyhill (who had paid Antonelli) after the Millville Quarry sale. Thus, Mr. Campbell has no equitable or legal claim to more than his *pro rata* share of the Oxon Cove proceeds, and it was -- and is -- inequitable for him to keep more than that *pro rata*

share. As the Court indicated, it is likely that the $2, 000, 000 testified to as paid by Antonelli to Lyon after the Millville Quarry sale did not constitute a refund of any overpayment by Lyon, and that Campbell's characterization of it as a way of passing on to Lyon Antonelli's gain on Lyon's having raised the option price by delaying the Millville Quarry sale is accurate. Even so, that transaction was entirely unrelated to, and preceded by years, the Oxon Cove sale, and would not in the Court's judgment, either as to the event itself or the trial testimony concerning it, put Lyon so in *pari delicto* as to warrant a finding on the issue in favor of Campbell. What it boils down to in simple terms is that, as a result of the parties' falling-out over the Millville Quarry deal (which one should have thought would have been settled years ago, but was resurrected again and again in this trial), Campbell felt he had some sort of "rough justice" right to keep more of the Oxon Cove proceeds than his fair share. As chancellor in equity, ' this Court determined that he was wrong, and it stands by that determination with regard to the present motion.

For similar reasons, the Court will refuse to apply the "clean hands" doctrine to bar Campbell's recovery in this case.

The defendant's argument, based on I.C.E.'s status as a Nevada corporation, that the Court should apply the Nevada law of *pari delicto*, is specious.

The Court also firmly rejects the idea that prior proceedings in this Court and in the Fourth Circuit establish a "law of the case" that precluded trial on the constructive trust theory.

Finally, the Court rejects defendant's evidentiary challenge. As half-owner of I.C.E., which was the whole owner of L-C (titleholder of the Oxon Cove property), Mr. Lyon had a good, equitable claim to half of the proceeds of the sale of the Oxon Cove investment property,

notwithstanding the parties' old dispute about the Millville Quarry sale. The Court rejects defendant's suggestion that the evidence establishes, by any standard of proof, Mr. Campbell's having paid the entire Antonelli debt. There is no "paper trail" establishing that proposition -- not one note marked "paid," not one check, not one word of testimony from Mr. Broyhill. Mr. Campbell's own words on deposition about what he paid -- relied upon by the Court in reaching its findings and conclusions - - constitutes the best evidence of what really happened, *i.e.*, that he paid the half of the debt he was morally obligated to pay, and it fully supports the Court's findings of fact and the judgment entered in favor of the plaintiff. And, above all, there was - - and still is -- no explanation forthcoming from defendant as to the document, signed by him, that severed his half of the "Antonelli debt" from Lyon's and made it a separate, personal obligation owed by him to Antonelli prior to the Millville Quarry sale. This was clearly a key piece of evidence that was present in the record supporting the Court's findings and conclusions.

For all the reasons stated, defendant Campbell's motion for new trial or to alter or amend judgment, considered pursuant to Fed. R. Civ. P. 59 and/60, will be denied, by a separate order to be entered herein.

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN W. LYON

v. CIVIL NO. S 98-1129

LARRY A. CAMPBELL, et al.

[Entered May 7, 2001]

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is, this 7th day of May, 2001, by the Court, ORDERED:

That defendant Campbell's motion for new trial or to alter or amend judgment, considered pursuant to Fed. R. Civ. P. 59 and/or 60, BE, and it hereby IS, DENIED.

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN W. LYON

v. CIVIL NO. S 98-1129

LARRY A. CAMPBELL, et al.

[Entered April 25, 2001]

JUDGMENT ORDER

This case having come on for trial, pursuant to a pretrial hearing held on April 20, 2001, on plaintiff's claim for imposition of a constructive trust and for corporate dissolution pursuant to Md. Corps. & Assns. Code Ann. Section 3-413, and the issues having been tried before and determined by the Court sitting as a court of equity under the substantive law of Maryland, and the Court having fully heard all the evidence and arguments, of counsel and having rendered an oral opinion in open court containing its findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52, and the plaintiff having voluntarily dismissed all claims for corporate dissolution pursuant to Md. Corps. & Assns. Code Ann. Section 3-413, it is by the Court this 24th day of April, 2001, ORDERED AND ADJUDGED:

1. That a constructive trust BE, and it hereby IS, IMPOSED upon the defendant, Larry A. Campbell, as trustee, for the benefit of plaintiff, John W. Lyon, in the amount of $897,500.00;

2. That judgment BE, and it hereby IS, entered in favor of plaintiff, John W. Lyon, against the defendant, Larry A. Campbell, in the amount of $897,500.00, without pre-judgment interest, but with interest at the legal rate from the date hereof until paid;

3 That costs BE, and they hereby ARE, assessed against defendant Campbell, in favor of plaintiff Lyon; and

4. That the Clerk of court mail copies hereof to counsel for the parties.

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MARYLAND

JOHN W. LYON

plaintiff

vs. Civil No. S-98-1129

LARRY A. CAMPBELL, et al.,

defendants

April 24, 2001

Baltimore, Maryland

BEFORE: His Honor, Frederick N. Smalkin.

APPEARANCES

For the plaintiff:

David Shertler
Barry Coburn

For the defendants:

Gerard P. Martin
Thomas Zagami
Steven Wrobel

* * *

THE COURT: All right. Thank you.

ORAL OPINION OF THE COURT

THE COURT: All right. I am ready to give you my opinion on this matter here. This embodies my conclusions of law and findings of fact with specifically so denominated pursuant to Rule 52 of the Rules of Civil Procedure.

I must say that trying to piece together what happened here between these people over a period of 15 years of antagonistic relationships and business transactions that were essentially done, looked as if they were done, by people in kindergarten in terms of observing the formalities of the law of commercial transactions, the law of corporations, and every other law in Maryland, is very difficult. It is sort of like trying to rebuild the Titanic, and the analogy was chosen for a reason, from a deck chair and a billiard table. It is extremely difficult to do this, but there are a couple of major principles, and let me state the legal principles that I have in mind first.

The first principle, having to deal with constructive trust, is, as I have indicated several times over the course of this case, that a constructive trust is imposed where it is inequitable for someone to hold absolute title to property as against someone else, and a confidential relationship is not required for the imposition of a constructive trust, but the law of Maryland clearly views a confidential relationship as a situation where a constructive trust may arise. See, generally, M.L.E. on trusts, that is, Maryland Law Encyclopedia, which is West 1997 edition, Section 67, which states inter alia relying on authority, I am not going to give you the citation of all the authorities:

"The presence of a confidential relationship makes it easier for a constructive trust to be imposed."

Then the question is: What constitutes a confidential relationship? And I think there is no question that the law in this regard was properly stated in, of, all places, Lyon versus Campbell, 120 Md. App. 412 at 439, where the Court of Special Appeals cited, with what seems to me to be approval, the instructions of the trial court to the jury which said, among other things, when a corporation has just a few shareholders, that is, when just a small number of persons own shares in the corporation and the corporation is run like a partnership among the shareholders, then the shareholders owe the corporation and other shareholders duties of loyalty, good faith, and fair dealing.

Now I think that is an accurate statement of Maryland law as to the relationship of people who are de facto running corporations like their own personal businesses out of their hip pockets, which is what this case is shot through with.

I think this accurately states the law of Maryland that they owe each other, not just the corporation derivatively enforceable by derivative action, a fiduciary duty.

I earlier held the other week that under Kann v. Kann the appropriate remedy for breach of fiduciary duty, in such circumstances, is not an action at law but an action for the imposition of a constructive trust.

All right. The law indicates that once that kind of relationship has been established and, clearly, the burden of proving, in general, the existence of a constructive trust is on the person seeking to establish it, the burden of showing the relationship is on the person who is asserting the existence of it and the law of Maryland, also, is to that effect as

summarized and stated in section 69 of M.L.E. on Trusts, where that is asserted as the bases for the imposition of constructive trust, the burden of proof of such relationship rests on the party asserting it.

I find that Mr. Lyon has adequately proved here the existence of a confidential relationship imposing a fiduciary duty as per the trial court's instructions in Lyon v. Campbell, that I just averted to at 120 Md. App. 439.

Now, the law of Maryland, also, is to the effect that where a confidential relationship within the meaning of the law of constructive trust is shown to exist, a presumption obtains that confidence was reposed and that when the transaction complained of resulted from fraud or undue influence and superiority in the transaction by which the dominant party profited, the burden of affirmatively proving good faith, or the absence of undue influence, or of proving justice, equity, and the fairness of the transaction is on the party denying the existence of the trust. For this proposition is cited a number of cases, including Wimmer v. Wimmer, 287 MD 663.

And I think, Mr. Schertler, you were right with regard to where the burden lies in this case. I think that sorting this out, as I have indicated before, the law of Maryland imposed a fiduciary duty on Mr. Campbell personally and as director, as a shareholder of L.C. and I.C.E. to account fairly for the proceeds of sale. The burden is on him to show that the transaction here that resulted in him receiving essentially the entire net of the proceeds less the million dollars paid to Patz is fair. And I think that is the how law of Maryland comes out.

Now, frankly, folks, I have seriously considered applying the law of pari delicto here.

Unclean hands has no application to this. I think, Mr. Martin, you raised the defense of unclean hands. I think it is a red herring here. Frankly, the questions that were put to -- and I am considering all the evidence not just what is before the 4th circuit in the summary judgment record -- considering all the evidence, I think that Mr. Lyon's denial of sale of the stock and his responses about pledging them or collateralizing them was not clear and I think that the whole thing is just a red herring. And I will, I definitely find that the defense of unclean hands is not applicable based on Lyon's statements about the stock that had been pledged to Patz.

Frankly, what I would like to do, if I could do it consistent with the law of Maryland, would be to apply the rule of in pari delicto here and just tell both of you to walk away and go back to where you came from, which would probably result in another go round of litigation, not to mention probably myself getting sued, and your taking it to the 4th circuit.

But, in Maryland the law of in pari delicto, and the rule is, the maxim entirely is: "in pari delicto potior est conditio defendentis, aut possidentis, " what ought to happen here is that both of you just walk away from it, frankly, and just let it go.

Unfortunately, under the law of Maryland I can't apply the rule of in pari delicto here based on perjury by Lyon or otherwise. The law in Maryland in pari delicto -- I am not saying, as a matter of law I can't -- I am saying as a matter of equity, as the chancellor, I can't do it on these facts, as stated in Schneider v. Schneider at 335 MD 500, and very comprehensively reviewed by Judge Rodowski in that case. He reviewed the origin and traced the origin of the rule in pari delicto back, of course, we all know it from those of us who have been in for a while the rule that parties in pari delicto could not obtain a divorce, a divorce being an equitable remedy.

But, it also goes back way before that and, in fact, I have traced back to the rule stated in the old case of Roman versus Mali, 42 MD 513, which was decided, I think, in 1875, and in that case there was a claim of in pari delicto raised. Mr. Mali attempted to avoid the in pari delicto defense. He had claimed that scheme to defraud creditors was the creation of Mr. Roman and that Mali perjured himself on the advice of Roman, in who Mali had placed complete confidence.

Six judges of the Court of Appeals recognized that equity would not deny relief unless the parties were in pari delicto. And the Court said there in Mali at 554 to 55:

> "We are not unmindful of the fact there are exceptions to the general rule that courts of justice will not actively interpose the release of a party who has been part of such particeps criminis in illegal or fraudulent transaction." And that, one of the exceptions is: "Where the parties suing, although particeps criminis, is not in pari delicto with the adverse party. There may be different degrees of guilt as between the parties to the fraudulent or illegal transaction, and if one party act under circumstances of oppression, imposition, undue influence, or at a great disadvantage with the other so that it appears that his guilt is subordinate to that of the defendant the court in such cases will relieve."

Now I have taken into account the in pari delicto matter as an equitable matter. I will talk about the legalities of it in a minute, but you are essentially arguing in pari delicto, which is that if Mr. Campbell did anything wrong in not paying over the money it is just because Mr. Lyon was just as wrong in suckering him out of the two million dollars

that had to be paid on account of the delay in the Millville Quarry deal, I mean, that is largely what you are arguing as an equitable matter and that is what Mr. Campbell got up here and testified to, that is why he is sore at Lyon to begin with, maybe not to begin with from years prior to that, though.

In my judgment, that whole situation, and even perhaps any perjury that occurred here at the trial, and I am going to get to that, because this is what Schneider versus Schneider, specifically, deals with. It, essentially, says trial perjury does not put a party in pari delicto, that is basically what Schneider versus Schneider says. The remedy for perjury is an indictment of the perjurer and not to refuse relief on the grounds of in pari delicto.

Now, the 4th circuit viewed the unclean hands situation as too far disconnected from the distribution of the proceeds or to constitute an equitable defense in this case. And, frankly, if you go back to, either you are talking about trial perjury here, which Schneider v. Schneider says is not a situation in pari delicto, or the Millville deal. If you go back to misconduct of Lyon years ago, which is where this whole thing started, and why Mr. Campbell has an animosity against him, I agree with your position, Mr. Martin, that Mr. Lyon is not any kind of saint in this picture and that he may well have defrauded a whole bunch of people in this deal and others, as basically the jury found down in Prince George's County but the court of Special Appeals reversed that. It wasn't exactly fraud but he didn't act right. Didn't act in a fair, just, and equitable manner, and he probably didn't.

I probably would agree with what the jury said down there in P.G. County, but that is besides the point. It still didn't, in my judgment, rise to the level of in pari delicto so as to disentitle him to relief in this case if a right to receive equity is otherwise shown, because it is too remote.

Now I am going to move onto the question of whether, with the burdens of proof being allocated as they are in a constructive trust arising out of a fiduciary relationship under Maryland law, a constructive trust in good conscience ought to be imposed here.

Clearly, by the time that the proceeds were disposed of by the Board of Directors of L.C. - I.C.E., Mr. Lyon had been frozen out. He had no role in that. So he was standing on the outside looking in. As I indicated, clearly, under Maryland law at that point there was a fiduciary duty on the Board of Directors of L.C. and I.C.E. to account for the money, and that translates to a burden of proof in this court, under Maryland law, as cited before Wimmer v. Wimmer, and M.L.E. on Trusts, Section 69, to prove good faith, or the absence of undue influence, or of proving justice, equity, and fairness in the transaction.

Now what we are looking at here is justice, equity, and fairness of the transaction. There is no outright fraud, nothing was hidden. Good faith is sort of questionable, but I am not going to decide the case on good faith. It has to do really with justice, equity, and fairness. It is up Mr. Campbell to prove at this juncture that it is fair, equitable, and just for him to keep the whole enchilada.

Now, looking then at the facts, in light of that burden of proof, what do we have? We have, first of all, evidence that is sort of equally chimerical on both sides about whether Antonelli, who was Lyon's buddy, every got paid and, if so, what he got, and whether Broyhill, who was Campbell's buddy, ever got paid, and what he got. Basically, we have got the say-so of Lyon and Antonelli on the one and Campbell on the other hand, with no Broyhill. So, who knows?

I don't think I have to, specifically, resolve who paid exactly what, because what I find as a fact here is that, and we come back here to the agreement in September of 1984, bolstered by the deposition testimony of Mr. Campbell. It is clear to me, as a fact, and in connection with the fairness, justice, and equity of the whole thing, that Mr. Campbell really said it right there in his deposition, on page 43 and following, where he said that, he is being questioned here, I think it was Mr. Schertler questioned him on his deposition. This would be Plaintiff's Exhibit 95, page 42:

> "QUESTION: Did you and Mr. Lyon have an understanding with Mr. Antonelli as to who would pay Mr. Antonelli what he was owed for buying these notes?
> ANSWER: I am not sure that we did, but I always felt that I owed half of whatever Mr. Antonelli put up.
> "QUESTION: You felt?
> ANSWER: Yes, sir.
> "QUESTION: That the understanding was that you owed half?
> ANSWER: Yes
> "QUESTION: What about Mr. Lyon?
> ANSWER: I can't speak for Mr. Lyons.
> "QUESTION: Was your understanding that he owed the other half?
> ANSWER: I know I wouldn't be responsible for no more than half. What him and Mr. Antonelli worked out because was some property and some other things involved in these notes and stuff that I wasn't involved in I never asked about. I never, I didn't ask him so I don't know.
> "QUESTION: Your understanding was that you owed Antonelli half?
> ANSWER: I feel a moral obligation to pay Mr. Antonelli

"QUESTION: Did you pay him that half?
ANSWER: Yes, sir, I did.
"QUESTION: Did you pay him any more than that half?
ANSWER: I just told you I gave him $200,000.00 more than he was entitled to.
"QUESTION: You said you felt responsible for half, do you know how much half was that you paid?
ANSWER: I think I just answered you, what was in the papers he didn't discount a nickel, et cetera.
"QUESTION: You paid half?
ANSWER: I paid half of it."

And later down on 46 after some objections:

"ANSWER: I paid him half of the notes that I knew about. How many other notes was entangled up with that didn't have to do with me, I don't know.
"QUESTION: Okay. When did you pay Mr. Antonelli that half?
ANSWER: At the settlement of the quarry.
"QUESTION: When you got that money from selling the quarry; is that fair?
ANSWER: Yes, sir.
"QUESTION: You paid Antonelli his half from the proceeds of the Millville Quarry sale?
ANSWER: No, sir."

Then they go onto say the money came from Broyhill to pay Antonelli. And I don't think there was any mention, and maybe if you can come back to me with it, there might have been some mention in here of him actually paying Broyhill. I didn't see it in the deposition. Was there? He testified to it here. I don't think there was any mention of it in the deposition.

But, in any event, he says here in terms of the payment on page 51:

> "QUESTION: When you say half, what entitled you to more than half of the money from the Oxon Cove sale?
> ANSWER: I was entitled to, as far as I was concerned, to be paid whatever I was paid, reimbursement for the money, the note I paid to Mr. Antonelli.
> "QUESTION: Your half share; is that what you are saying?
> ANSWER: No, I am saying my half share didn't have any bearing in it.
> "QUESTION: Okay. Then what have you paid Mr. Antonelli that entitled you to the remainder of the proceeds after the Patz payment?
> ANSWER: I don't think I can answer that. I think it is a legal conclusion."

And then it goes on with absolutely nothing except to say that Mr. Kirkson sent me a letter to this after the fact.

Well, there you have it. I mean, basically, it is Mr. Campbell's opinion that it would be fair for him to keep the entire enchilada because he paid Antonelli, or through Broyhill, half of what was jointly owed.

But, the problem with that is from Mr. Campbell's own testimony that he felt that that was his personal moral obligation and debt to pay half, he paid half, and that is the way he viewed it. This is bolstered by Exhibit 73, which I must say Mr. Cook made a very erudite attempt to explain away, but it can't be explained away.

Defendant's Exhibit 73, clearly, whether it is technically a novation or not I don't know, because it doesn't involve three parties, but it clearly drastically altered the nature of the Lyon-Campbell relationship vis-à-vis Antonelli before the Millville Quarry sale. It altered it in 1984. And what it did was it changed that obligation from a joint and several obligation and crystallized it into an obligation whereby Mr. Campbell assumed several, undoubted, and personal liability for half of the debt owed to Antonelli; that is what he paid out of the Millville Quarry proceeds, that is what he got the money from Broyhill to pay, that is what he allegedly paid Broyhill back, and what Broyhill released. When Broyhill released his Oxon Cove interest, what he released was the interest in the property as a consequence of Mr. Campbell paying the half of the debt which Mr. Campbell viewed as his own personal moral obligation to pay, and which, as a matter of law, legally, not just equitably, but legally, was Mr. Campbell's personal debt to Antonelli. And it was legally his personal several debt to Antonelli as per the document which is Defendant's Exhibit 73, agreement relating to exercise of options, where it is plainly stated that Antonelli and Campbell have agreed that one half of these obligations, meaning the 3.266 million and later, of course the interest accrued by the time of the Millville sale to get it up to almost 4 million, shall be reflected in a series of promissory notes by Campbell to Antonelli, which shall be separate from the liability of Lyon to Antonelli.

This, then, became Campbell's personal debt, that is what was paid off to Antonelli through Broyhill and later paid to Broyhill. And I don't have any reason to disbelieve Mr. Campbell's testimony on this, Broyhill was paid off. But what Broyhill was paid off was for the money that paid off Campbell's personal indebtedness to Antonelli, which was only half of the original Antonelli debt.

The benefit to the corporation, I think, was incidental, because Campbell recognized that he and his wife were on the hook personally. He says that in his deposition. He and his wife were on the hook personally for his half of the debt. And that persona, on-the-hook liability was crystallized by Defendant's Exhibit 73, which says, hey, it is my debt, I am going to pay half of that debt, which grew to 4 million dollars by the time Campbell got his hands on enough cash out of the Millville settlement through Broyhill to pay off the debt.

And that is what happened here. And I think from Campbell we sort of got a big, this is a true case of, post hoc rationalization. Mr. Campbell is rationalizing keeping the money. I can't say that I am not sympathetic with Mr. Campbell about this, frankly, but it would take, you know, it is essentially unscrambling eggs to try to sort out everything that went wrong in the relationship between these parties and the different grievances they have. They have been suing each other a half dozen times in all different courts up and down, on appeal, not on appeal, here, there, everywhere, and here is where the rubber finally meets the road.

And where the rubber meets the road, frankly, I cannot find in good conscience that Mr. Campbell has shown a sufficient case of justice, equity, or fairness, to allow him to retain the entire net proceeds of the Oxon Cove sale on the claim that he was acting in behalf of L.C. in paying off his personal indebtedness to Antonelli through Broyhill, which then of course induced Broyhill, after he paid Broyhill, to release the lien. Yes, Broyhill released the lien, and maybe Broyhill would have released it anyway, since he was a buddy of Mr. Campbell, that I don't know. Mr. Campbell hasn't proved by evidence other than his own testimony that he paid Broyhill, but I don't have to find that he didn't pay Broyhill. Suppose he paid Broyhill, that is fine. But, what he paid Broyhill is his personal debt, not something that is attributable to the corporation or Lyon through the corporation.

So, based on this, I would find, for all the reasons I have stated, that equity here, I am sitting as a chancellor, compels the imposition of a constructive trust on the proceeds of the sale as follows; it would be unfair and inequitable for Mr. Campbell to retain the entire net proceeds.

Now what about the taxes here? Does this figure of three, seven-ninety-five, after costs of the sale, does that include the taxes?

MR. MARTIN: No, sir.

THE COURT: The taxes were 40,000; is that correct?

MR. SCHERTLER: $43,000.00

THE COURT: Are you in agreement on that, Mr. Schertler?

MR. SCHERTLER: I am not.

THE COURT: You are not? It would seem to be a pretty easily ascertainable thing.

MR. SCHERTLER: It is.
Judge here is what we have got here.

THE COURT: Well, I am going on that line. Don't go below that line that is the fourth line from the top, three, seven-ninety-five remaining after cost of sale. What I want to know is, is that inclusive or exclusive of the corporate taxes that were paid?

MR. SCHERTLER: I believe it is inclusive of the corporate taxes.

MR. MARTIN: It is not, Your Honor. The taxes were paid out of money that Mr. Campbell retained. He testified to that, I believe. I think, if you need to take further testimony, Your Honor.

THE COURT: What evidence is there? Where did he testify to that?

MR. MARTIN: I thought he had testified, Your Honor.

THE COURT: Do you have any evidence to disprove that?

MR. SCHERTLER: yes, I believe - -

THE COURT: Have you got any evidence that the taxes were paid? Well, in getting from 4 million to three, seven-ninety-five what you did was you deducted $205,000.00. What is that 205,000, if that doesn't include the taxes?

MR. MARTIN: Your Honor, it couldn't have included the taxes because the taxes hadn't been paid at the time of this closing.

THE COURT: Where did is the three, seven-ninety-five come from, the settlement sheet?

MR. MARTIN: Yes, Your Honor, I think it does.

MR. SCHERTLER: No, sir, it doesn't.

THE COURT: It doesn't? Where does it come from?

MR. SCHERTLER: Judge, it comes from these three exhibits that have been introduced. These are the bank accounts for L.C., Inc. Mr. Storke - -

They show the money that went in and out as a result of the sale. And what we did is we took the money, up got 90 thousand coming in here, this is the actual sales proceeds, 3.726 million some dollars; these are the deductions that we made, deductions for professional fees, there is interest income being made.

THE COURT: Where is the deduction for taxes?

MR. SCHERTLER: And that is what we have. This is it right here, sir. This is it right here.

MR. MARTIN: Your Honor, I couldn't see the exhibit.

MR. SCHERTLER: 4/14/97 Internal Revenue Serv I.C.E., $43,977.0, that is the deduction for the taxes paid in April of 1997; and, we included that, as well as the payments that were made to each of the directors of 11,000 each at a later point.

THE COURT: Included in what?

MR. SCHERTLER: In this chart right here deducting the $205,000.00 in closing costs, taxes, directors payments, professional fees that were paid out.

THE COURT: You are claiming that was not necessary?

MR. MARTIN: No, Your Honor. I thought he was looking, I thought that exhibit was the settlement sheet.

THE COURT: No, it is not.

MR. MARTIN: No, it is not, Your Honor.
I am sorry. I don't have anything to dispute this.

THE COURT: That is all I wanted to know. That is all I wanted to know. Because I don't want to have anybody pay, I don't want Mr. Campbell to have to pay the whole tax load, basically, that is not fair either, or the whole anything else.

If you take three, seven-ninety-five and divide it 2, you get one eight-ninety-seven-five, right? Is my math correct?

MR. SCHERTLER: Yes.

THE COURT: Then you deduct the one million, which was paid clearly on behalf of Mr. Lyon to Mr. Patz, that leaves a net of eight-ninety-seven-five that he should get, because Mr. Lyon received zero from this.

MR. SCHERTLER: That is right.

THE COURT: Which means that Mr. Lyon's net take out of this should be eight-ninety-seven-five, and that is where it comes down.

MR. SCHERTLER: I agree with that.

THE COURT: All right. And so what I find is that under the circumstances, the law of Maryland and the rules of equity compel a finding that the defendant, Mr. Campbell, is, and I am not going to impose a constructive trust on the other directors, or former directors, because nobody is seeking to get their directors' fees back, nobody is claiming that was illegal, or fraudulent, or oppressive for them to receive director's fees, so there is nothing to be imposed on them, and none of the net proceeds went to them, other than reimbursements and fees. So the trust will be imposed on Mr. Campbell individually in the amount of $897,500.00.

Frankly, because of the novelty of the issues, the closeness of the questions, and the relationship between the parties, I do not find that equity compels any prejudgment interest on this. And, in my judgment, it would not be fair and equitable to require the payment of any prejudgment interest. There will be interest from the date of the judgment, but not before then. So, as constructive trustee Mr. Campbell is accountable to Mr. Lyon for the sum of $897,500.00, with interest from the date of the judgment.

And there is no provision, as far as I know, that would shift fees, attorneys fees here; is there?

MR. MARTIN: No, sir, not that I know of.

MR. SCHERTLER: No, Your Honor.

THE COURT: The standard American rule applies and, of course, costs will be taxed against Mr. Campbell in this circumstance. I don't see enough reason to alter the usual rule that the winner gets his costs in this case. That is my judgment. That is my opinion. If it will be written up I reserve the right to turn it into good English if I have to, if I am forced to, otherwise, it will stay right where it is, and the judgment will be entered probably tomorrow. And I will welcome you taking it up to Richmond, and let's see what they say this time. So I understand your positions. It is not an easy case. There is a lot to be said on both sides. As I said, if I could, I would say in pari delicto on both of you, and have you go home. I can't do it, because I don't think the law of Maryland, in fairness and equity and good conscience I have to apply the law of in pari delicto of Maryland as I find it, and that seems to me not to be a defense in this case. This is largely what you are arguing,

Mr. Martin, although you didn't argue it in terms of pari delicto, that is basically what you are arguing, but I didn't see it that way.

But thank you, gentlemen, it was a pleasure to have both of you, and all counsel here, you did a thorough professional job and I appreciate it.

MR. CAMPBELL: Your Honor, can I address you a question?

THE COURT: No, sir, you cannot address me. If you need clarification ask Mr. Martin.

(There was a pause in the proceedings.)

MR. MARTIN: Your Honor, could we approach? It might be better if I approach the Bench with Mr. Schertler.

THE COURT: Sure. Hold on everybody.

(There was a discussion off the record.)

THE COURT: I understand.

MR. MARTIN: Thank you, Your Honor.

THE COURT: Just to follow up on that, as I indicated, the law of Maryland is pretty clear on this under the case I cited in terms of case specific remedy. You understand.

MR. MARTIN: Yes, I do.

THE COURT: Read that case and discuss it with Mr. Campbell.

MR. MARTIN: I will, Your Honor.

THE COURT: Thank you.

(Trial concluded.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MARYLAND

JOHN W. LYON

plaintiff

vs. Civil No. S-98-1129

LARRY A. CAMPBELL, et al.,

defendants

Baltimore, Maryland
April 23, 2001

BEFORE: His Honor, Frederic N. Smalkin.

APPEARANCES

For the plaintiff:

David Shertler
Barry Coburn

For the defendants:

Gerard P. Martin
Thomas Zagami
Steven Wrobel

THE COURT: All right, be seated, please. This is civil case number S-98-1129 for trial, Lyon versus Campbell.

Go ahead. If you want to make a brief opening I will be glad to hear it.

MR. SHERTLER: Your Honor, thank you.

Can I have the Court's indulgence for one moment?

THE COURT: Sure.

(There was a pause in the proceedings.)

MR. MARTIN: Excuse me, Your Honor, before we start could I just make one statement? I am looking at the Court's Order we got this morning.

THE COURT: Yes.

MR. MARTIN: And I just want to put on the record, Your Honor, our objection to going forward on the constructive trust. I don't think I made it clear Friday.

THE COURT: Well, you didn't have any objection to it. You sat there.

MR. MARTIN: Well, Your Honor, it came out of the blue to me, and maybe shouldn't have, as you said, but it did. And I just don't think it has been pled. Having said that, I know we are going to trial today, and I just want to - -

THE COURT: Well, I think certainly that by the time it got to Richmond, somebody had some idea that it was going on. But, nobody sat down and seriously thought about it. But it's going to go ahead anyway.

I don't think you're seriously prejudiced by it, because it doesn't change any of the evidence or anything. You didn't want a jury trial.

MR. MARTIN: I didn't say that, Your Honor. I just said I want to put that. Second point, Your Honor - -

THE COURT: So what's the prejudice to the defendant, if any?

MR. MARTIN: Well, Your Honor, the prejudice is that there may be some difference in the burden of proof with respect to the constructive trust than there may be on a normal claim.

THE COURT: How would that disfavor the defendant?

MR. MARTIN: Because the defendant in the case as it was - -

THE COURT: All you are arguing is equitable defenses anyway, Mr. Martin, as far as I can see.

MR. MARTIN: Yes, Your Honor, but there is still the issue of - -

THE COURT: Is there any legal defense that's unavailable?

MR. MARTIN: The business judgment rule might be rendered unavailable by the shift in presumption.

THE COURT: The business judgment rule doesn't apply anyway because, as you said, it is not a statutory action. The business judgment rule is a statutory defense; isn't it?

MR. MARTIN: It still applies as an equitable defense also, Your Honor.

THE COURT: Well, that's right. So now that you always said that the statute didn't apply anyway, so where are you prejudiced?

MR. MARTIN: I agree, Your Honor. I am just putting my objection on the record.

THE COURT: Okay. The objection is on the record. I hear nothing that would indicate any prejudice. So we are going to go ahead. Go on.

MR. MARTIN: Second point, Your Honor, is the constructive trust, as I understand it, is that the money, the trust would be imposed on the money that was alleged to be in the hands of Mr. Campbell. There is no money alleged to be in the hands of Mr. Cook and Mr. Storke, so I think a constructive trust action against them doesn't apply.

THE COURT: Are they still defendants here? I don't know, I have not heard the evidence yet.

MR. MARTIN: They are defendants in the other count, Your Honor, only in the sense that - -

THE COURT: Mr. Shertler - - then they stay here. Okay. I'll consider what, if any, remedy to put against them in the future point, if I hold in favor of the plaintiff.

Proceed.

MR. SHERTLER: Just to anser that.

THE COURT: Unless you have another point you want to make.

MR. MARTIN: Well, Your Honor, the dissolution count, the statute doesn't say you can sue a director for dissolution. The statute stays you sue the - -

THE COURT: If they want to go home, they can go home. But, I mean, are you - -

MR. MARTIN: It may make a difference if they are defendants.

THE COURT: Mr. Shertler.

MR. SHERTLER: Sir, I think they still are defendants. In kind of thinking more about your constructive trust theory, and the fact of the matter is that LC, the corporation owned the property. LC the corporation, sold the property, rather, the proceeds of the property.

THE COURT: Right.

MR. SHERTLER: The three directors, the three defendants here, were the men that had control over those proceeds. I would submit that the constructive trust theory applies to all three.

THE COURT: They might have all been constructive trustees. All right, they stay. Have a seat.

Go on, Mr. Shertler.

MR. SHERTLER: Your Honor, thank you.

Sir, in reality we believe that this is a very simple case. We understand that these two men, Mr. Lyon and Mr. Campbell, have been involved in many business deals together for over 30 years now.

We understand that there have been many disputes between them, and a lot of litigation between them. But, I submit to the Court that this case is simple. The question here is whether Jack Lyon, who was a, always a 50 percent shareholder of ICE, should have received 50 percent of the net proceeds when ICE, acting through its wholly owned subsidiary LC, sold the Oxon Cove property.

We submit the answer to that question has to be, yes. And we submit that the defendants, Mr. Campbell, Mr. Storke, Mr. Cook, as directors of ICE, violated obligations that they had, whether we tried to phrase them as fiduciary obligations, or as the Court has recognized on Friday, obligations as a trustee, they violated those obligations.

THE COURT: Well, the obligations of a trustee are by definition fiduciary; aren't they?

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN W. LYON

v. CIVIL NO. S 98-1129

LARRY A. CAMPBELL, et al.

[Entered April 20, 2001]

ORDER

For the reasons stated in open Court this date, IT IS by the Court, ORDERED that the trial of this case will be conducted non-jury on the causes of action of Imposition of a Constructive Trust and Maryland Statutory Corporate Dissolution.

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge

Dated: April 20, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MARYLAND

JOHN W. LYON

plaintiff

vs. Civil No. S-98-1129

LARRY A. CAMPBELL, et al.,

defendants

April 20, 1001

Baltimore, Maryland

BEFORE: His Honor, Frederick N. Smalkin.

APPEARANCES

For the plaintiff:

David Shertler
Barry Coburn

For the defendants:

Gerard P. Martin
Thomas Zagami
Steven Wrobel

* * *

PROCEEDING.

THE COURT: Civil case number S-98-1129 for hearing on Defendant's Motion for Summary Judgment. I am going to deny it as a Motion for Summary Judgment outright. And the reason I am going to do that is because it's untimely.

The 4th circuit case law clearly provides that a Motion for Summary Judgment may not be filed on the eve of trial. There are cases flatly holding that, and it's because you need the minimum ten-day response time.

I am not going to sanction you under Rule 11, but it's close. All right. Is that understood?

MR. MARTIN: Yes, sir.

THE COURT: All right. Give me the motion for marginal denial.

However, we are going to proceed to consider the issues that were raised by my letter of April 18, which were addressed in terms of what there is for trial in this case, because, after all of these years of litigation, it is finally becoming clear to somebody, I guess me, what is involved in this case.

And I don't understand how we could have gone through years of litigation without counsel understanding the case, on either side.

Now, it is clear to me that there is no derivative shareholder action; is that correct?

MR. SHERTLER: Yes, sir.

THE COURT: And you have abandoned any such claim?

MR. SHERTLER: Yes, sir.

THE COURT: If that's the case, you've already abandoned the Maryland Statutory Claim under 4-213; is that correct?

MR. SHERTLER: Your Honor, I am not sure that we would agree with that.

THE COURT: All right. Give me the statute. Have you got the Courts and Associations?

I am just trying to figure out this -- and if need be, I am going to enter an amendment to the pretrial order to tell -- so that I've got a handle on what there is for trial.

As I read the Maryland Courts and Associations section, it is clear that the statutory action under 4-213, subsection G says, in so many words, it can only be brought as a derivative action; isn't that correct?

MR. SHERTLER: Yes, sir.

Your Honor, I will retract what I said. When I looked at that statute and read Mr. Martin's motion, I think that's correct, it's not a derivative action. We are filing as an individual shareholder.

THE COURT: All right.

MR. SHERTLER: We cannot proceed under that statute.

THE COURT: All right. If that's the case, then you cannot proceed under that statute. Now will you, please, articulate for me what the nature of your claim is? You have not pleaded fraud, as I see it; is that correct?

MR. SHERTLER: Yes, sir.

THE COURT: You have not pleaded fraud. What precisely is the nature of your claim, as an individual?

MR. SHERTLER: Judge, I think as an individual shareholder, the claim can still go ahead against the three directors for their breach of fiduciary duty to Mr. Lyon as a shareholder of the corporation. There is no question.

THE COURT: Under what theory of law?

MR. SHERTLER: Here is the theory of law: there is no question that Maryland case law establishes a fiduciary duty on the part of directors. There are two fiduciary duties; one is to the corporation.

THE COURT: Yes.

MR. SHERTLER: The other fiduciary duty is to the shareholders.

THE COURT: Where there is an action that arises out of contract or other -- and we are looking right at the language of that case you sent me, the Dan Yellowitz case. That's D-A-N -- where is all that stuff?

THE CLERK: Right here.

THE COURT: All right. Give me the Dan Yellowitz case. And it's explicating the Waller case. Dan Yellowitz is 2001 Maryland App., Lexis 64, explicating the Waller case. And it says here that the injured stockholder can bring suit for damage to himself personally.

Now you're claiming, are you not, sir, that the injury to Mr. Lyon was that he did not get in his pocket the money that was the proceeds of the sale; is that correct?

MR. SHERTLER: That is correct.

THE COURT: All right. You have the right to bring an action on that, but it's got nothing to do with an action by him as a shareholder; except that, he is entitled to receive

that money, because he was one of the few shareholders, in fact, the only other shareholder other than Campbell, he was a 50 percent shareholder. And your whole theory is, is it not, that Mr. Campbell kept the money for himself rather than distribute it to Lyon; is that correct?

MR. SHERTLER: That's correct.

THE COURT: And, sir, what you have -- go ahead.

MR. SHERTLER: I guess, Judge, the way I look at this is that it is exactly what you said, his 50 percent ownership as a shareholder in LC.

THE COURT: Right. You have a claim, but you never have thought about what it is. You have not pleaded fraud. It is not a breach of fiduciary duty by directors in their capacity as such. What you are claiming is that Mr. Campbell took Mr. Lyon's money.

MR. SHERTLER: Judge, where I think I disagree with you is where you say there is no breach of fiduciary duty here. Mr. Campbell, Mr. Storke, and Mr. Cook, as directors, had a fiduciary duty to the shareholder, Mr. Lyon, to make sure that his interest, that 50 percent interest in the money that came for the Oxon cove sale were protected.

They violated that duty when they allowed Mr. Campbell, through board of directors' actions, to take the money for himself.

THE COURT: All right. That -- I understand clearly what your factual theory is. And no wonder things are so loused up in this case, Mr. Coburn, because that does not fit. Mr. Shertler, I'm sorry. I thought you were. I looked at this and it says, Coburn.

Mr. Shertler, that is the reason why things are so loused up in this case because nobody has sat down and thought about it. The language here that they're talking

about says, that the shareholder - - and we are looking at the language out of Waller, that's quoted in Dan Yellowitz.

Unquestionably, a stockholder may bring suit in his own name to recover damages from an officer or corporation for acts which are violations of a duty arising from contract or otherwise and owing directly from the officer to the injured stockholder, though, such acts are also violations of duty owing to the corporation.

MR. SHERTLER: Correct.

THE COURT: Now, what is going on her, sir, is, that you wish to impress the proceeds with a constructive trust. That's what's going on here. That is the theory of law.

MR. SHERTLER: Well, I am not sure - -

THE COURT: You're claiming that Mr. Campbell converted the proceeds to his own use, and that - - that rightfully 50 percent of the proceeds of the sale belong to Mr. Lyon; isn't that your case?

MR. SHERTLER: That's right. And if Mr. Campbell had been a third person not associated with the corporation and stole it, or embezzled that money, from the corporation, Mr. Lyon might have a cause of action for fraud against Mr. Campbell. He might have been - -

THE COURT: I'm not talking fraud. We're talking breach of trust. We are talking constructive trust growing out of breach of fiduciary duty.

MR. SHERTLER: Okay, I - -

THE COURT: Maryland law is very clear, Mr. Shertler, that there is no action at law, as such, for breach of fiduciary duty.

MR. SHERTLER: Judge, I think that that's where I disagree. I think that Maryland law does provide an individual shareholder the right to file a suit against the directors for breaching - -

THE COURT: What is your authority?

MR. SHERTLER: I think that - -

THE COURT: Other than what you cited.

MR. SHERTLER: If you will look in this - - in this - -

THE COURT: Dan Yellowitz.

MR. SHERTLER: Dan Yellowitz case - -

THE COURT: I was just reading to you right out of it.

MR. SHERTLER: I know. Do you have the Lexis citation?

THE COURT: Yes, I do. I've got it right here.

MR. SHERTLER: If you look at page 12 of the Lexis citation, it talks about the fact that there are exceptions in which a shareholder may bring a suit in his or her own name.

And then it says, for example, and it quotes in Beraling. The last sentence of that paragraph refers to a case in which the owner of stock was allowed to bring suit against the manager of the corporation for violating the fiduciary duty.

I think what we need to focus here on is that Maryland law does give an individual - -

THE COURT: Yes, exactly. Because he was holding it as a trustee. When a trustee violates a fiduciary duty, a constructive trust is imposed upon the proceeds, sir.

MR. SHERTLER: Judge, I am not sure that that -- in our minds that --

THE COURT: And that is not a Maryland case. We're dealing with Maryland law here. That's a New York case.

MR. SHERTLER: I understand, but it seems to be sanctioned, or at least accepted by the Maryland court in terms of providing examples of what could be and individual shareholder's right to bring a lawsuit.

Judge, I think what the focus of this case is whether there is a specific and personal injury to the shareholder, rather than the shareholders in general. And I think what distinguishes this case is that the injury here is personal and specific to Mr. Lyon. It doesn't affect the other shareholders in this case who happen to be Mr. Campbell. Mr. Lyon is the only shareholder aggrieved by the actions of the board of directors.

THE COURT: Where is the case on the constructive trust saying there being no independent action at law for fiduciary duty, the Maryland case, 734 Atlantic 2nd. Weren't you looking at it on you -- Maybe it is Kann versus kann. Okay. Oh, I have got it here. I've got it here.

Sir, the problem with your case is you have not thought it out. Mr. Shertler, I am not disagreeing with you that there is a remedy here. The problem is your remedy is -- this and the very case you cite here in support of that remedy, Wesley versus Sottile, S-O-T-T-I-L-E, talks about a trustee that -- where the manager of an unincorporated automobile sales agency, who held a considerable amount of capital stock as a trustee, impaired the business by persuading the automobile manufacturer to transfer the agency's contract to another company.

It was held that the owner of the stock could bring suit against the manager for violating his fiduciary duty.

Mr. Shertler, I don't disagree with that. What I am telling you, sir, is that under the law of Maryland, an action of that nature is an equitable action for imposition of a constructive trust.

Maryland law is crystal clear on this and has been since 18 whatever. And the case is Kann versus Kann, K-A-N-N versus K-A-N-N, 344 Maryland 689, 1997, at 703. There is a long explication with regard to this. And that where a person who is the beneficiary of a trust, and you're arguing a trust type duty here. You're arguing that the fiduciary duty was the duty akin to that of a trustee.

So even if there is not an outright trust, there is a case of constructive trust, that is, money that is received by someone for the use of someone else, which is the classical definition of a constructive trust. Okay?

MR. SHERTLER: I understand you, sir.

THE COURT: And I'm saying that you've got a remedy, sir, but it is an equitable remedy for imposition of a constructive trust. You haven't pleaded fraud. If you had pleaded fraud, then we would have a different story.

Now, it is just that nobody, until just now, has sat down and thought about what's really happening here. They didn't think about it in Richmond. I didn't think about it when the case was before me earlier.

But now, it is at the fish or cut bait stage, and somebody has got to start thinking about what's involved in this case from a legal standpoint, not just the parties interminable bad blood wrangling that' been going on for the last 20 years.

I agree with you that you have stated a case that has to be tried, but it is an equitable case only. You have no case at law under Maryland law. That's why you're so confused here.

The cases that you have cited, sir, have to do with the -- with a duty that owed individually by someone as a fiduciary. When that duty is breached under Maryland law, the remedy that is to be imposed in circumstances like this, and the legal action that you have to resort to, is not an action at law. It's an action for the imposition of a constructive trust.

MR. SHERTLER: your Honor, the only -- and I understand your reasoning entirely. And I understand what you are saying.

THE COURT: Yes.

MR. SHERTLER: The only place where I might disagree with you is that I think as you look at this Maryland law -- and we cited another case that came out of a Tennessee court, but it was a Tennessee court that was interpreting Maryland law in that situation, Bayberry Associates versus Jones.

And I'm sorry, I was not able to get a copy of it. I have a copy of it here with me, but I was not able to get a copy to court or counsel before we came in.

THE COURT: All right. Does it say something -- has it got a remedy other than the imposition of a constructive trust?

MR. SHERTLER: Judge, it does.

It seems to say that the distinction between derivative and direct suits should be made on the basis of an injury rather than duty. A shareholder can maintain a direct action only when he or she sustains a special injury, that is, an injury distinct from that suffered by other shareholders for a wrong involving the contractual right of a shareholder.

THE COURT: That is correct. There is no contract that anybody has pointed me to here; is that correct?

MR. SHERTLER: No, that's true.

THE COURT: All right. Therefore, you are proceeding ex delicto. Give me the cause of action under Maryland law ex delicto, sir, that covers this. What is it? Is it negligence? Is it fraud? What is it?

MR. SHERTLER: In our opinion, it is breach of fiduciary duty --

THE COURT: All right. Then that's clear. Breach of fiduciary duty calls for equitable remedy only, no remedy at law. Maryland law is clear as a bell on this since 1850.

MR. SHERTLER: Okay. The only reason I would disagree is that I think that what the case law has done as it has progressed, it has focused on whether or not the injury -- whether a shareholder can bring a suit in his own name focuses on the injury to that shareholder, not the --

THE COURT: What is the injury to Mr. Lyon?

MR. SHERTLER: The fact that --

THE COURT: He didn't get his money.

MR. SHERTLER: -- he didn't get his money.

THE COURT: Where is the money?

MR. SHERTLER: Mr. Campbell.

THE COURT: Mr. Campbell has it because he breached a fiduciary duty; is that correct?

MR. SHERTLER: Yes, sir.

THE COURT: End of inquiry. That is the classic situation for a constructive trust. Kann versus Kann says that. Every Maryland case says that. The MLE on constructive trust says that. That is where one has received money that, in good conscience and equity, belongs to someone else, or ought to be paid to someone else.

Here you claim that's the situation because Mr. Lyon was entitled to 50 percent of the proceeds of sale. The law will impose a constructive trust. And it is purely an equitable situation.

MR. SHERTLER: The only place where I disagree with the Court and I know this isn't spelled out - -

THE COURT: give me your authority. Well, you have none.

MR. SHERTLER: I believe that the interpretation of these cases, Dan Yellowitz and this Bayberry case, seem to focus on the injury. And if the injury is specific to the shareholder, it gives the shareholder a legal remedy not an equitable one.

THE COURT: show me wher it says that. You will never find it. It says, they're not precluded from bringing suit because of the fact that they can't pursue a derivative remedy there. Yes, I'll grant you that. But, show me where it says they have a remedy at law.

MR. SHERTLER: Judge - -

THE COURT: I guarantee you you are going to look high and low, and you are not going to find it.

MR. SHERTLER: I have not found - - we have not found a case that looks at this situation.

THE COURT: You are not going to find it.

The case -- the very one you just relied on, this Blaxley case, is a fiduciary duty breach of trust case. That's an equitable case. It is clear in Maryland law that there is no action at law against the trustee for breach of a fiduciary duty.

And you're claiming that here the corporate directors are trustees, aren't you?

MR. SHERTLER: I'm claiming that the -- well, I'm claiming the corporate directors have a fiduciary duty.

THE COURT: Exactly.

All right. And breaches of fiduciary duty sound in trust, and they are not actionable at law. Maryland law is clear on this. It is clear as a bell.

MR. SHERTLER: I guess, where the court and I are looking at different things is, in order to see whether there is a legal duty, and I feel like Dan Yellowitz is telling us, don't look at the cause of action, whether it's contract, fiduciary duty, negligence, look at whether the harm is to the individual shareholder. If the harm is to the individual shareholder, that share -- vis-à-vis the other shareholders, that shareholder then has a right at law to bring a cause of action --

THE COURT: Where is the case that says that?

MR. SHERTLER: Judge, there is nothing that says it that clearly.

THE COURT: There isn't one. You will not find one if you look high and you look low. I assure you, you will not find it.

Give me the MLE, please, Bridget, on trusts. Oh, you've got it right here.

All right. Have a seat. I will hear from Mr. Martin. I'll call on you again, Mr. Shertler. Go ahead.

MR. SHERTLER: Thank you, Judge.

MR. MARTIN: Your honor, the one thing I would offer in the beginning is that the Bayberry case in a later case, America Network Group v. Costic, from the court of Appeals from Tennessee, they said that, interpreting Maryland law, our court determined that only under very limited circumstances would shareholders have a direct action against directors. It violates fiduciary duty.

Then they don't speak to the question you are talking about, which is they may have a direct action but is that direct action at law or inequity.

It is our position and not articulated as well as the Court has that whatever is left in this case is equitable.

THE COURT: No, you didn't articulate it. You should have articulated it years ago. It's been three years that this mess has been going on. Including going down to Richmond.

MR. MARTIN: Your Honor, I'm not going to argue with the Court, but their complaint did allege a derivative action.

THE COURT: the fact that it didn't comply with Maryland law or Federal law for derivative action.

MR. MARTIN: I have never saw that, Your Honor. And I even cited Rule 23.1 to you in our motion, but I didn't cite the that court because it wasn't clarified and I apologize for that.

THE COURT: Go on.

MR. MARTIN: I mean, our position is that - -

THE COURT: I didn't look at it is closely either, but I don't get paid to look at it.

MR. MARTIN: If anything is left here, Your Honor, it is an equity action in front of the Court. And we had analyzed it in terms of the first two counts of this complaint can't be brought in the manner in which he sought to bring it, and Waller versus Waller makes that pretty clear, as does the Dan Yellowitz case they cited this morning, Your Honor.

THE COURT: All right.

MR. MARTIN: What's left is in count 3. And in Count 3, which is the Statutory count for breach of fiduciary duty of the directors, our argument is that because that count, we believe requires him to have been able to vote at the time of the actions he complained of, that he can't procede on that count, because he clearly did not have the authority to vote.

It is a different issue from what the 4th circuit said.

THE COURT: What relief is sought here, sir, other than - - Mr. Shertler, what relief is sought other than recoupment of the money?

MR. SHERTLER: I think we have alleged compensatory damages and punitive damages, but other than that - -

THE COURT: You're not alleging mental distress, or emotional injury, or anything like that?

MR. SHERTLER: No, Your Honor.

THE COURT: All right.

MR. SHERTLER: Your Honor, could I impose upon the Court to - -

THE COURT: Go ahead, Mr. Martin. Mr. Martin is not done yet, or maybe he is done.

MR. MARTIN: Your Honor, what we had to say was said in our motion. I still think that what is left, if anything, is an action before the Court, an equitable action. And we think that he can't bring that action in this case, because he did not -- it's different from having given up all his rights to the stock. He clearly gave up his voting rights to the stock.

THE COURT: That's another question. And that's one I'll handle under 2-413 which is not a jury issue under any circumstances. 2-314, whatever it is.

MR. MARTIN: Your Honor, we stated that the claims are available for trial Monday don't involve Counts 1 and 2, for the reasons we talked about.

THE COURT: Go ahead, Mr. Shertler.

MR. SHERTLER: Your Honor, can I proffer to you a copy of this Baybeerry case?

THE COURT: I will be glad to look at it. Hand it to the clerk. I'll read it right now. Go ahead and sit down, and I will read it over now.

MR. SHERTLER: Thank you.

(There was a pause in the proceedings)

THE COURT: All right, they quote Waller directly I see that.

MR. SHERTLER: Yes, sir.

THE COURT: Again, quoting Waller directly, analyzing Waller.

But, isn't Dan Yellowtiz a more recent analysis, like three days ago, more persuasive than what the Supreme Count of Tennessee does, about what Waller means?

MR. SHERTLER: Well, I think that they go in -- not necessarily. I think Dan Yellowitz is talking about --

THE COURT: You don't think so?

MR. SHERTLER: Well, certainly anything more recent.

THE COURT: Sure, that's the general case. Judge Motz told me very clearly that I have to follow the Court of Special Appeals unless there is a very persuasive reason to disregard its precedent.

MR. SHERTLER: I am not saying that.

I think that what both cases point out is that we are focusing on whether the shareholder incurred a violation of a personal right to him.

THE COURT: I am going on to read Bayberry. It's talking Delaware courts.

Well, there is the Homer case, which I am very familiar with, because I applied it before in a sell-out or buy-out case. And the court there was dealing only with the equitable remedy for the relief of fraud committed by a majority of the officers. Equity would provide relief for it by the way of an injunction. Nothing about an action in law.

(There was a pause.in the proceedings.)

THE COURT:. Direct attacks, violated fiduciary duty. Weinberger and Walter J. Slosh. Now that's -- Walter J. Slosh. All right, Walter J. Slosh. All right.

Again, sir, in the two cases that are relied upon here, the Bayberry Associates, let me read you this:

"Plaintiffs, in accordance with Weinberger and Walter J. Slosh, Associates, have stated a claim for relief on the allegations of self-dealing and/or acting in the interest of persons other than the shareholders."

That is your botton-line take on Bayberry, right?

MR. SHERTLER: Yes.

THE COURT: All right, now. I go back to the discussion of Walter J. Slosh and Weinberger in Bayberry itself. The Maryland Court of Appeals agreed that these rights of fair appraisal are not exclusive and that Maryland law also permitted equitable relief. Equitable relief. Equitable relief, no action in law, in Walter J. Slosh and Weinberg.

I know that, because I know those cases. And there was no action at law recognized there. There was equitable relief recognized as appropriate.

So I am going to hold flat out that there is -- and this will be basically a modification of the pretrial order -- I am just going to strike the jury trial. We are not going to have a jury in here. I am going to call the jury section and cancel it.

I am going to give you a trial. And my holding right now is that under Kann v. Kann at 344 Maryland 689 703, et cetera, there is flat out no tort claim stated here. Kann versus Kann says that you have to look at the historical aspect of the development of the remedy. And you have to look at whether it carries the possibility of punitive damages. Whether it is seeking compensatory damages.

What you're seeking here is a violation, in my judgment, that is plainly analogous to the action that a trustee faces when breaching a trust, which includes the imposition of a constructive trust, which is not an action at law in Maryland law. Therefore, since it is not triable, as a matter of law, to a jury in Maryland, it is not Federally

triable to a jury. Many cases on the U.S Ex Rel Rahman, R-A-H-M-A-N, 198 F3d, at 489, 4th circuit 1999. there are a number of cases to that effect, so you do have a remedy.

And, furthermore, the reason I say that this is an equitable remedy and not a remedy at law within the meaning of Kann v. Kann in these circumstances is that Maryland historically has recognized that in a situation like this, the appropriate remedy is the constructive trust.

And let me just point to you Section 64 of the Maryland Law Encyclopedia on Trust, which says, among other things.

> "Any transaction may be the basis for creating a constructive trust, where for any reason, on holds funds or property which in equity or good conscience should be possessed by another."

That is what you're seeking here, to have Mr. Campbell disgorge the funds that he has received.

"It is sufficient that the conscience of the Court requires the granting of such relief, or that the conscience of the Court of equity would be traumatized if the legal titleholder were allowed to deprive the beneficial owner of that which in good conscience belongs to the latter."

Now there is no asportative theft here, because Mr. Lyon was never in possession of the money. Therefore, you cannot maintain a tort action for conversion. All right.

The only thing you have is the equitable action to have Campbell disgorge the money that he has wrongfully taken, if, indeed, I find he wrongfully took it.

I'm going to listen to the case with an open mind and see what he says. See what the evidence says. If Campbell took money that should be paid to Lyon, I'll impose a constructive trust and make him pay it back. It's that simple.

Going on:

> "The remedy of a constructive trust is applied where property has been acquired by fraud, misrepresentation, or other improper method, or where the circumstances render it inequitable for the party holding title to retain it."

Which is clearly the case is if, as you allege here, Mr. Campbell purposely gypped Mr. Lyon out of the proceeds of the sale of what Mr. Lyon should have gotten because he owned half of the corporation.

And that's the bottom line. When you divorce it from all of the shenanigans about stockholders, and derivative actions, and corporate trustees, and, you know, some kind of vague fiduciary duty enforceable at law, which doesn't exist under Maryland law, Kann v. Kann.

I know the 4th circuit will probably disagree with me, but I think I know Maryland law a little bit. And I'm able to read plain Maryland law, Kann versus Kann.

And it says that,

> "Where one wrongfully or without right takes possession, or assumes control of property, or receives the funds and profits a constructive trust ordinarily arises the favor of the person entitled thereto.
>
> When property has been acquired in such circumstances that the holder of the legal title may not, in good conscience, retain a beneficial interest, a Court of Equity converts him into a trustee."

All right. And citing, for example, the Levin versus Schofer, S-C-H-O-F-E-R, 184 Md 205; Grimes v. Grimes 184 Md 59, both 1945 cases.

So you see what is happening here is that the individual is a trustee, and your action is to enforce his duty as a trustee, his fiduciary duty as a trustee, to pay the proceeds over to the person entitled to it. And under those circumstances, you are dealing with the equitable remedy recognized in Kann v. Kann, which is for the Court of Equity to determine not a court of law.

Now, if you had pleaded fraud, or some kind of recognized tort, and Maryland law does not recognize tort under these circumstances, I flatly hold that. There is no authority to recognize it. Kann v. Kann, in my judgment, would not recognize it here in this odd situation. So that is what is happening.

Here is another bunch of stuff out of the MLE. I mean, I could go on and on and on. But, let me see here -- "A constructive trust may arise out of a violation of a good, confidential, or fiduciary relationship." If you're claiming that there is a fiduciary relationship here, then, of course, the enforcement is by a constructive trust.

For example, let's see here. A confidential relationship under Maryland law exists where one party is under the domination of another, or where, under the circumstances, such party is justified in assuming that the other will not act in a manner inconsistent with his or here welfare.

Well, again, that fits exactly what you are claiming here. That as a director of the corporation, where there were only two shareholders, the person who was essentially in control of the corporation is under a duty to act for the good of all the shareholders, which includes the other 50 percent shareholder, which makes him a fiduciary.' And that's what's going on here.

And, again, under Maryland law citing Wimmer v. Wimmer 287 MD 663, Bass against Smith, 189 MD 461, 1948. That there is a sufficient confidential relationship there.

And, again, a duty to convey property may arise where -- convey it by way of constructive trust, where it was required through duress, undue influence, or mistake, or through a wrongful disposition of another's property.

And, again, citing to Vasman versus Pottaschnick, V-A-S-MA-M versus P-O-T-T-A-S-C-H-N-I-C-K, 188 MD 105, 1947; Carter versus Abramo, A-B-R-A-M-O, 201 MD 339, 1953.

Again, what you are claiming here is there was as wrongful disposition of the half of the proceeds of the sale, which in good conscience and equity belonged to Mr. Lyon because he had a 50 percent interest in the corporation, and the money was received for the benefit of the corporation and its stockholders, to be divided proportionately according to their interest in the corporation.

That's your case. Isn't it?

MR. SHERTLER: Yes, actually that is our case.

THE COURT: So these cases are old. They go back to the 40's and 50's, but they still state valid principles of Maryland law.

And Kann v. Kann makes it clear, that's 1997, very recent case, that the division of law and equity in Maryland is very alive. It is very viable.

And we observe, clearly, the division of law and equity in Maryland with regard to actions that sound in the enforcement of a trust, including constructive trusts. Kann v. Kann says that, and I am not going to turn this into a tort. This just isn't a tort. You didn't really plead a tort.

So what we are going to do is, we're going to bring the case on for trial on Monday. I am going to listen to all of the evidence, and we are going to hear it as a court of equity. That, and also, I'm going to hear the dissolution claim.

I am not sure, Mr. Martin, that the fact that he didn't actually exercise voting rights at the time these actions took place, disentitles him now to bring an action for dissolution under the terms of the statute, because he is now vested.

And I looked tat the case with regard to the residual reversionary interest case, and I think that is rather distinguishable. The point of the matter is when he filed the action, he had acquired, as far as I know, when the action was filed, he acquired total voting and complete rights because the pledge had been released and the stock had been released to him.

So I think he has got standing to bring an action for dissolution. Now, to the extent to which that overlaps with an equitable remedy and contructive trust, I suppose there is a complete over run.

But I'm going to go ahead and hear the case on Monday, but I am not going to call in a jury. What I am doing, basically, is visiting the issue sua sponte of whether there is a matter triable by a jury here, and basically reopening the pretrial conference. And my view now is there is not.

I wish we had all focused on this a whole lot earlier. But, I assure you, and you know, I know there is a history of bad blood between these people. And, as I told Mr. Coburn, I don't hold it more against one party than the other.

And I'm going to listen to both of them and see what they have to say, because somebody here is going to win and somebody's going to lose. And I'm going to listen to it with an open mind. I don't care, you know, whether it's a Hatfield or a McCoy that wins this the case, frankly.

Let's put it on the bottom line, we've got the Hatfields and the McCoys. And it makes no difference to me who wins. It's going to be based on the evidence and the law of Maryland on constructive trust. Okay.

MR. SHERTLER: Very well, Your Honor.

THE COURT: that's where we are going to go. Thank you very much for coming over on such short notice. I appreciate it. I'm sorry that Mr. Coburn was tied up in another court, but I think you have very competently put your point of view. The problem is that it's an odd duck --

MR. SHERTLER: I agree with that.

THE COURT: -- that, you know, you are chasing down the lane here. It is a real odd duck. But, I think what I waddles like is a constructive trust, and has from the beginning, but nobody saw it until -- you know, not that I am any genius. In fact, I am stupid as a plank in some things, at least the 4th circuit tells me repeatedly. But, I think there is no question here that that's what we are dealing with under Maryland law. Okay.

MR. SHERTLER: Very well.

THE COURT: All right.

MR. SHERTLER: Judge, I would think that if you're trying the case, we could get this done in two days.

THE COURT: I would think so.

MR. MARTIN: I think so.

THE COURT: We have no jury, no voir dire, anything like that. And, you know, we move right a long, and we'll get it tried. Okay?

MR. SHERTLER: Very well, sir.

MR. MARTIN: Thank you.

(Thereupon, at 11:30 o'clock a.m., the court adjourned to reconvene at 10:00 o'clock a.m., April 23, 2001)

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
FREDERIC N. SMALKIN
UNITED STATES DISTRICT JUDGE

[Entered April 18, 2001]

TO COUNSEL OF RECORD

Re: *John W. Lyon v. Larry A. Campbell*, et al.,
Civil No. S-98-1129

Dear Counsel:

The Court is writing to clarify that the plaintiff's shareholder derivative action on behalf of L-C Inc. and ICE Inc. is not properly before the Court for trial on Monday, April 23, 2001, as plaintiff's complaint was not verified as required by Fed. R. Civ. P. 23.1. Therefore, plaintiff's case will proceed only on direct actions by him in his capacity as a shareholder against the directors of the corporation.

Although informal in nature, this letter constitutes and order of the Court and will be docketed as such.

Very Truly Yours,

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge

cc: Addressees
Court File - Original

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF FREDERIC N. SMALKIN
101 W. LOMBARD STREET
BALTIMORE, MARYLAND 221201
UNITED STATES DISTRICT JUDGE
(401) 962-3840

[Entered: March 28, 2001]

TO COUNSEL OF RECORD

Re: Lyon v. Campbell, et al. Civil No. S 98-1129

Dear Counsel:

I have read and considered your letters of March 27, 2001.

Quite obviously, as there is not joint consent to reference of this case of a magistrate judge, I must try it myself.

The trial of this case will commence on April 23, 2001 at 10:00 a.m. If Mr. Coburn is not present because of his involvement in a criminal case, someone associated with him in the practice of law will be here to represent his client, or his client will go unrepresented.

Although this letter is informal in format, it nonetheless constitutes an order of court, and the same will be docketed and filed as such in the court file.

Very Truly Yours,

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge

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August 29, 2000

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VIA FACSIMILE AND MAIL

The Honorable Frederic N. Smalkin
United States District Court for
the District of Maryland
U.S. Court House
101 W. Lombard Street
Baltimore, Maryland 21201

Re: John W. Lyon v. Larry A. Campbell, et al.
Civil No. S-98-1129

Dear Judge Smalkin:

The purpose of this letter is to confirm that all counsel are available on October 18, 2000 at 9:30 a.m. for the Pre-Trial Conference in the above-referenced case. We appreciate the Court's cooperation in rescheduling this matter for a new date and at a new time.

Very truly yours,
/s/ Thomas J. Zagami
Thomas J. Zagami

TJZ/sjb
cc: Gerard P. Martin, Esquire
Barry Coburn, Esquire

Ok. P-T Conf rescheduled to 10/18/00 @ 09:30 am

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF FREDERIC N. SMALKIN
UNITED STATES DISTRICT JUDGE
101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201
(410) 902-3840

[Entered August 15, 2000]

TO COUNSEL OF RECORD

Re: Lyon v. Campbell
Civil No. S 98-1129

Dear Counsel:

I have received the mandate of the Fourth Circuit remanding this case, in part, for further proceedings.

The only further proceedings that I will conduct in this case will consist of a pretrial conference and a trial.

The pretrial conference will be held on Friday, September 29, 2000, at 9:15 a.m. A trial date will be set at the pretrial conference.

Although this letter is informal in format, it nonetheless constitutes an order of court, and the same will be docketed and filed as such in the court file.

Very Truly Yours,

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHN W. LYON,
Plaintiff-Appellant,

v. No. 99-2455

LARRY A. CAMPBELL; EDWARD W. STORKE;
ROBERT R. COOK,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frederic N. Smalkin, District Judge.
(CA-98-1129-S)

Argued: May 4, 2000
Decided: July 19, 2000
[Entered: July 19, 2000]

Before WILKINSON, Chief Judge, and NIEMEYER and MICHAEL, Circuit Judges.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

COUNSEL

ARGUED: Barry Coburn, COBURN & SCHERTLER, Washington, D.C., for Appellant. Gerard Patrick Martin, MARTIN, SNYDER & BERNSTEIN, P.A., Baltimore, Maryland, for Appellees. **ON BRIEF:** Steven F. Wrobel, MARTIN, SNYDER & BERNSTEIN, P.A., Baltimore, Maryland; Thomas J. Zagami, HODES, ULMAN, PESSIN & KATZ, P.A., Towson, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION
PER CURIAM:

John Lyon, a fifty percent shareholder of ICE, Inc. (ICE), brought this diversity action against Larry Campbell, Edward Storke, and Robert Cook, the three directors of L-C, Inc. (L-C), a company wholly owned by ICE. Lyon alleges that the defendants committed various wrongs in connection with the sale of a tract of land owned by L-C. The district court (1) dismissed Lyon's implied contract claim, (2) granted summary judgment to the defendants on Lyon's claims that they breached their fiduciary duties and violated Maryland's Corporations and Associations Code, and (3) denied Lyon's motion to file a second amended complaint. We affirm the dismissal of the contract claim, vacate the award of summary judgment on the other claims, and affirm the denial of the motion to amend.

I.

We recite the facts in the light most favorable to Lyon, the nonmo vant in the summary judgment proceedings. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Lyon and Campbell were involved together in business deals for many years. According to the district court, the two men are now enveloped in a"cloud of acrimony." *Lyon v. Campbell*, Civ. No. S 98-1129, mem. op. at 1 (D. Md. Oct. 1, 1999). In 1971 Lyon and Campbell formed ICE, a holding company. It appears that Lyon still owns a fifty percent share of ICE and that Campbell owns the other fifty percent. L-C is wholly owned by ICE. Lyon was on the board of directors of L-C until May 1995. Campbell and Storke have continued to serve as directors of L-C, and Cook

became a director (replacing Lyon) in May 1995. In 1974 L-C bought (for $495,000) an 80-acre tract of land called Oxen Cove, which is located partly in Prince George's County, Maryland, and partly in the District of Columbia. L-C bought the Oxen Cove property for the purpose of operating a landfill, but the company was unable to obtain the necessary permits. For the next twenty years Lyon and Campbell tried without success to sell Oxen Cove. Finally, in January 1995 a representative of Corrections Corporation of America (CCA) contacted Lyon, advising him that CCA was interested in the property for a prison site. Later that month Lyon received a proposed option contract from CCA that would have allowed CCA to buy Oxen Cove for $2.28 million. On January 18, 1995, Lyon wrote to Campbell and Storke, forwarding CCA's proposal and requesting a special meeting of the board of directors of L-C and ICE so that CCA's interest in buying the property could be explored. In a reply to Lyon, dated February 28, 1995, Campbell said that CCA's proposed terms, especially the price, were unacceptable. Campbell believed that the "asking price for the property should be in the area of $6-1/2 to $7 million." The L-C board of directors (Lyon, Campbell, and Storke) finally met on April 17, 1995, to consider the option contract proposed by CCA. Early in the meeting Campbell expressed his concerns about CCA's offering price and the duration of the proposed option. Only at the end of the meeting when Storke made a motion to reject CCA's current proposal, did Lyon say he was "willing to accept the contract as offered." Lyon quickly added, however, that he was willing, in order to achieve unanimity, to accept Campbell and Storke's suggestion that L-C hire a real estate consultant, who would assist the company in evaluating CCA's proposal and in negotiating with CCA. The L-C board then authorized Campbell to contact a consultant for a fee proposal, and the consultant was engaged within a few days.

At the April 17, 1995, L-C board meeting, Storke asked Lyon if he had sold or collateralized his ICE shares. Lyon responded that he had not. That was not true. At the time of the L-C board meeting Lyon was the defendant in an adversary proceeding in the bankruptcy of Excavation Construction, Inc. (ECI), a "Lyon-Campbell business venture that failed." *Lyon v. Campbell*, Civ. Action No. S 98-1129, mem. op. at 2 (D. Md. Oct. 1, 1999). The trustee alleged that Lyon had guaranteed substantial obligations that another company owed to the debtor (ECI), and the trustee sought to collect on Lyon's guarantee. Lyon admits that on April 11, 1995 (six days before the L-C board meeting), he and the trustee orally advised the bankruptcy judge in the ECI case that the adversary proceeding against Lyon had been settled. See Br. of Appellant at 8. Although Lyon and the trustee did not sign a settlement agreement until October 6, 1995, the agreement reflected that Lyon would (1) use his best efforts to sell Oxen Cove, (2) pay over a substantial portion of the sale proceeds (up to $1 million) to the trustee, and (3) pledge his stock in ICE to the trustee as security.

On April 26, 1995, nine days after the April 17, 1995, meeting of the board of directors of L-C, Lyon advised his fellow director, Campbell, that he had pledged his ICE stock to the ECI trustee. Campbell and Storke (acting as directors of ICE) reacted swiftly: a special meeting of the ICE board was called for May 15, 1995. At that meeting Campbell and Storke removed Lyon as a director of L-C and elected Cook in his place. Campbell said this action was taken against Lyon because he "no longer shared the long term business interest of L-C" as a result of his pledge of the ICE stock and his assignment of a portion of the proceeds from any sale of Oxen Cove.

After Lyon was removed from L-C's board, the reconstituted board (Campbell, Storke, and Cook) continued to negotiate with CCA for the sale of Oxen Cove.

Eventually, on August 30, 1996, L-C sold the property to CCA for $4 million. Lyon claims that despite his repeated requests, Campbell and the other two L-C directors failed and refused to provide him with any details about the sale of Oxen Hill or the disbursement of sale proceeds. Lyon does concede that $1 million went to the ECI trustee to satisfy Lyon's obligation that was secured by his pledge of ICE stock. (After the trustee was paid, he returned the ICE stock certificate to Lyon.) Campbell admits that he did not provide Lyon with any information about the sale and that he (Campbell) did not feel that he had any obligation to make an accounting to Lyon. In any event, it appears that over $2 million of the Oxen Hill sale proceeds went to Campbell. Campbell maintains that he was entitled to the balance of the sale proceeds as reimbursement for his payment of certain notes that had been guaranteed by Campbell and Lyon and that were held by Dominic F. Antonelli. Lyon and Antonelli have signed affidavits saying that Lyon and Campbell had each paid their one-half share of this obligation by 1990, well before the Oxen Hill sale.

Finally, after Campbell paid the ECI trustee the $1 million to satisfy Lyon's settlement debt to the estate, the trustee executed a release that discharged Campbell and "all persons acting in concert" with him from any claims arising out of or related to the ECI bankruptcy.

Lyon sued Campbell, Storke, and Cook in federal district court in Maryland, alleging, among other things, (1) that Campbell, by failing to tender to Lyon his share of the Oxen Hill sale proceeds, breached an implied contract between Lyon and Campbell governing how the assets of ICE and L-C would be used and distributed, (2) that Campbell, Storke, and Cook, as directors of L-C, breached their fiduciary duty to him (Lyon) by failing to pay him his share of the proceeds from the Oxen Hill sale and by failing to respond to his repeated requests for information, and (3) that Campbell, Storke, and Cook violated the Maryland

Corporations and Associations Code (a) by failing to perform their duties as directors in good faith, in the best interests of L-C, and in accordance with the applicable standard of care and (b) by engaging in conduct that was illegal, oppressive, or fraudulent.

The district court granted Campbell's motion to dismiss the contract claim on the ground that "the Court knows of no authority for the proposition that the formation of a corporation is accompanied by an implied contractual provision with regard to the distribution of corporate assets, short of liquidation." *Lyon v. Campbell*, Civ. No. S 98-1129, mem. and order at 3 (D. Md. Nov. 18, 1998). Later, the district court granted summary judgment for the defendants on the ground that Lyon's remaining claims were barred by the doctrine of unclean hands and by a release. In the alternative, the district court held (1) that Lyon's common law breach of fiduciary duty claim was barred by the business judgment rule and (2) that Lyon's two Maryland corporate law claims were not actionable, either because of the business judgment rule or because Lyon had failed to show any evidence of bad faith. Finally, the district court denied Lyon's motion to file a second amended complaint. Lyon now appeals.

II.

A.

First, Lyon argues that the district court erred when it held that Lyon's action is barred by his unclean hands. We agree with Lyon, at least at this stage. The unclean hands doctrine allows a court to reject the claim of a party who is guilty of "willful wrongdoing in relation to the controversy before it." *Bland v. Larsen*, 627 A.2d 79, 85 (Md. Ct. Spec. App. 1993) (quoting *Manown v. Adams*, 598 A.2d 821, 824-25 (Md. Ct. Spec. App. 1991), vacated on other grounds, 615 A.2d 611 (Md. 1992)). The district court said that Lyon had unclean hands because he withheld information from his

fellow directors about his settlement with the ECI bankruptcy trustee and because he urged the directors to sell Oxen Cove for $2 million. Lyon did wrongfully withhold information from the L-C board about his conflict (the stock pledge and settlement). Despite this initial failure to disclose, Lyon did not push for a quick or uninformed decision on the CCA offer when the other directors suggested that they hire a consultant to advise them on the market value of Oxen Cove. Moreover, as soon as Lyon disclosed his conflict, he was removed from the L-C board. Lyon's delay (of about ten days) in making the disclosure did not prevent the reconstituted L-C board from engaging in full and unhurried negotiations with CCA on the sale of Oxen Cove. The protracted negotiations, which Lyon was not a part of, appear to have dissipated any effect from Lyon's initial nondisclosure. The unclean hands doctrine applies to willful wrongdoing in relation to the claim being litigated. Lyon's claims in this lawsuit go to what the board (or Campbell) did with the proceeds of the sale and the board's failure to make any accounting to Lyon. It does not appear from the summary judgment record that Lyon is barred by unclean hands because his own nondisclosure in the beginning is not sufficiently related to his claim that the L-C board wronged him at a later time.

Second, Lyon argues that the district court erred when it held that Lyon's claims are barred by a release that the ECI bankruptcy trustee executed in favor of Campbell "and all persons acting in concert with him." The document releases Campbell and his associates from all claims arising out of or related to the ECI bankruptcy. The district court said that the release was a bar because (1) the trustee "had complete control over Lyon's interest in [ICE] under the pledge agreement" and (2) Lyon's personal liability to the estate was satisfied by Campbell with proceeds from the sale of Oxen Cove. We conclude that the release is not a bar to Lyon's claims. The settlement agreement between Lyon and the trustee provided that "Lyon is and shall remain the

legal and equitable owner of 2,500 shares of stock in ICE, which constitute 50% of all of the issued and outstanding shares of stock in ICE." The trustee had a pledgee's interest in Lyon's stock, and he returned the stock certificate to Lyon once Lyon's obligation was satisfied. The trustee did not have the power to-- and did not purport to -- release Lyon's residual rights as a shareholder of ICE.

Third, Lyon contends that the district court erred in its alternative holding that Lyon's common law breach of fiduciary duty claim is barred by the business judgment rule. Again, we agree that summary judgment should not have been granted on this ground. The business judgment rule supplies "a presumption that directors of a corporation act in good faith" and in the best interests of the corporation. *Zimmerman v. Bell*, 800 F.2d 386, 392 (4th Cir. 1986). See also *Wittman v. Crooke*, 707 A.2d 422, 425 (Md. Ct. Spec. App. 1998). Lyon has proffered sufficient evidence (for summary judgment purposes) to rebut this presumption. Lyon proffers at least the following: (1) the L-C directors would not provide Lyon with information about what happened to all of the proceeds from the Oxen Cove sale, (2) Campbell admitted that he would not communicate with Lyon (or his representative) about the sale, and (3) although Campbell claims he was entitled to the balance of the Oxen Hill proceeds as reimbursement for his payment of certain notes guaranteed by him and Lyon, the holder of the notes says that they were paid off -- on a 50-50 basis by Lyon and Campbell -- well before the Oxen Cove sale.

Fourth, Lyon argues that the district court erred in its alternative holding that his claims under the Maryland Corporations and Associations Code are not actionable. The district court awarded judgment to the defendants on Lyon's claim under Md. Code Ann. Corps. & Ass'ns S 2-405.1 (relating to the standard of care required of directors) on the ground that this claim is also barred by the business judgment rule. Because (as we just mentioned) Lyon has

proffered evidence to rebut the presumption of the business judgment rule, his claim under S 2-405.1 may go forward. The district court also awarded judgment to the defendants on Lyon's claim under Md. Code Ann. Corps. & Ass'ns S 3-413 (relating to the involuntary dissolution of a corporation) on the ground that Lyon did not show any "illegal, oppressive, or fraudulent" conduct by the L-C directors. On the contrary, Lyon has proffered evidence that he was kept in the dark about the Oxen Hill sale and that the proceeds were disbursed in a way that illegally diminished the value of his interest in L-C. As a result, Lyon's claim under S 3-413 may also go forward.

B.

Lyon argues that the district court erred in dismissing his implied contract claim and in denying his motion to file a second amended complaint. Finding no error in these rulings, we affirm them on the reasoning of the district court. See *Lyon v. Campbell*, Civ. No. S 98-1129 (D. Md. Nov. 18, 1998) (dismissing contract claim); *Lyon v. Campbell*, Civ. No. S 98-1129 (D. Md. Aug. 6, 1999) (denying motion to file second amended complaint). III. For the forgoing reasons, we vacate the district court's award of summary judgment for the defendants on Lyon's common law claim of breach of fiduciary duty and his statutory claims under Md. Code Ann. Corps. & Ass'ns SS 2-405.1 and 3-413. The case is remanded for further proceedings on these claims. We, of course, express no opinion on what the ultimate outcome should be in this case -- a case described by the district court as the "latest battle in the marathon litigative war between the Lyon and Campbell interests." *Lyon v. Campbell*, Civ. No. S 98-1129 (D. Md. Nov. 18, 1998). Finally, we affirm the district court's dismissal of Lyon's claim for breach of contract and the court's denial of his motion to file a second amended complaint.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN W. LYON

V.

LARRY A. CAMPBELL, et al.

CIVIL NO, S 98-1129

[Entered October 1, 1999]

MEMORANDUM OPINION

This lawsuit is the latest in a serious of litigative disputes that have grown out of the relationships -- personal and business -- between Mr. Lyon and Mr. Campbell over the years. *See Lyon v. Campbell,* 1994 WL 369453 (4th Cir. 1994); *Lyon w Campbell,* 324 Md. 178 (1991); and Lyon *v. Campbell,* 120 Md. App. 412, *cert. denied sub nom. MQ1 v. Lyon,* 350 Md. 487 (1998). *See also United States v. Campbell,* 702 F.2d 262 (1993) (criminal case related to Lyon's and Campbell's business). Review of the reported opinions just cited, particularly those of the Court of Special Appeals and the Fourth Circuit, will give ready witness to the cloud of acrimony that has enveloped these individuals and their associates, kith, and kin in the past as a result of their fallings out over various business matters.

The immediate controversy has to do with what Mr. Lyon claims as breaches of fiduciary duty and violations of Maryland statutes, asserted against the defendants, who were directors of two corporations, L-C, Inc. and ICE, Inc., in which plaintiff had an interest or was a

director. L-C, Inc., which was wholly owned by ICE, had, as its sole asset, a piece of real property called Oxen Cove. Mr. Lyon purported to sue, at least originally, on his own behalf as a 50% shareholder of ICE and on behalf of the corporation, in a derivative capacity. It bears mention that, prior to the incidents at issue here, Mr. Lyon had entered into an arrangement with the United States Bankruptcy Trustee to settle a bankruptcy fraud claim against him arising out of the bankruptcy of Excavation, Inc. (ECI), yet another Lyon-Campbell business venture, that failed. As part of that settlement, there was to be a pledge of all ICE stock owned by Lyon to a Mr. Patz, the bankruptcy trustee.

Currently, the parties have pending cross-motions for summary judgment. No oral argument is needed, as the briefing has been extensive. Local Rule 105.6, D. Md.

Oxen Cove had been on the market without a buyer for almost 20 years when a friend of Mr. Lyon approached him with a potential buyer, Correction Corporations of America, which made an offer to buy the property for $2,000,000. There was a meeting of the Board of Directors of L-C on April 17, 1995, at which Mr. Lyon conveyed the offer and pushed for an immediate sale of the property for $2,000,000. In that meeting, he did not disclose the bankruptcy settlement. In fact, he told the other directors that he had not agreed to "sell his ICE shares or do anything because of the settlement." He failed to disclose that he had reached a settlement with the trustee that, as later reduced to writing, among other things provided:

> Lyon shall, at all times and at his sole expense, use his best efforts to achieve the sale or other disposition of the L-C Real Estate. The purpose of said sale or other disposition is to allow the cash from the sale or other disposition to be distributed to ICE and, subsequently, a portion of the net proceeds to himself. Lyon shall further use his best efforts, after the sale of the L-C Real Estate, to bring about the liquidation of ICE and L-C or such other means as will achieve the result of Lyon receiving 50% of the net proceeds of the L-C Real Estate, without deduction or offset.
>
> At any time after the expiration of one (1) year following the Effective Date, the Trustee may demand that Lyon take specific action to compel the sale or other disposition of the L-C Real Estate and Lyon shall, at his sole expense, promptly take such action as demanded by the Trustee and all other steps reasonably within his power to achieve such result. These steps could include, but are not necessarily limited to, (1) institution of a proceeding for an involuntary dissolution of ICE in the courts of the State of Nevada or Maryland, (ii) requesting equitable relief under Section 2a(15) of the United States Bankruptcy Act, 11 *U.S.C.* § 1, *et seq.* (the Bankruptcy Act") or (iii) requesting the appropriate Court to appoint a receiver to consummate a sale of the L-C Real Estate. Lyon shall diligently prosecute all legal proceedings and may select counsel subject to the Trustee's approval and, if necessary, Court approval.

Exh. 8, Dfs. ' Mot. For Summ. Judg. at p. 6 (Patz-Lyon Settlement Agreement of Oct. 6, 1995).

Although the final written settlement agreement quoted above was not executed until the fall of 1995, the record shows, without dispute, that the written agreement simply memorialized the settlement that was reached between Lyon and Patz before the April Board of Directors meeting.

Obviously, the part of the settlement relating to the Oxen Cove sale was of paramount importance to the corporation and its other shareholders and directors, as it gave Lyon a motive to act in his self-interest with regard to selling corporate property. Yet, it went undisclosed.

At a subsequent meeting of the board, on May 15, 1995, by which time Mr. Campbell had become aware that Lyon had entered into a settlement with the trustee (but not the precise terms of it), Lyon was removed from the board of directors. The new board continued negotiations for the sale of the property, which was sold in July of 1995 under a $4,000,000 contract to Correction Corporations.

To the extent that the plaintiff complains of individual injury from alleged breaches of fiduciary duty by the directors of the corporation, he might well have no standing to do so under the holding of the Court of Appeals of Maryland in *Waller v. Waller,* 187 Md. 185 (1946). There is also a very strong argument that Mr. Lyon has no standing as a shareholder to press a derivative suit under Maryland or federal law, because he had entered into a pledge agreement that gave the bankruptcy trustee the functional equivalent of fee title to the Lyon stock and left Lyon holding only bare legal title, even though the transaction was denominated a pledge rather than a sale.

The Court will not, however, decide the case on these points, as it is not clear that the plaintiff had stripped himself of all rights in the stock so completely as to lose his

standing to bring a derivative action under either Maryland law or Fed. R. Civ. P. 23.1 and/or that *Waller* completely bars this suit.

Turning to the merits, in his opposition to defendants', motion for summary judgment, plaintiff contends that his case is not essentially a derivative action and also claims that it is not his "principal theory" that there was an injury to the corporation. The only fair reading of plaintiff's opposition memorandum is that Mr. Lyon is invoking principles of equity -- breach of fiduciary duty and/or unjust enrichment -- against Mr. Campbell and the other directors of the corporation. Having that in mind, the Court is firmly of the opinion that this action is barred by Mr. Lyon's unclean hands, as is patent from the record. Ettridge v. *TSI Group, Inc.*, 314 Md. 32, 42 (1988) (stating doctrine of unclean hands). There can be no genuine dispute under governing state and federal law that Mr. Lyon acted inequitably in urging the board of directors to approve the sale of Oxen Cove for $2,000,000 in a way that would have benefited him personally and immediately in his personal bankruptcy fraud settlement and which, as it turns out, was only half the value of the property to the buyer. In this Court's judgment, such inequitable conduct is sufficiently patent from this record as not to be the subject of a genuine dispute warranting trial, see *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and defendants have plainly shown their entitlement to judgment as a matter of law on the issue. *See, Hlista v. Altevogt*, 239 Md. 43, 48 -50 (1965). Here, Mr. Lyon fraudulently concealed critical information from the other directors of the corporation, which directly related to the same corporation's sole asset and the conduct of affairs in connection with which he now accuses defendants of acting wrongfully towards him. Whether viewed as a matter of unclean hands or under any

other rubric, this conduct bars relief. *See, Messick v. Smith,* 193 Md. 659, 667-69 (1949), cited in *Hlista, supra* at 48-49 (discussing inequitable conduct generally).

As a separate bar to relief, while the bankruptcy trustee still had virtually complete ownership and control of the plaintiff's ICE stock, the trustee "for himself and for the bankruptcy estate of ECI" had given Campbell and all persons acting in concert with him a complete and unequivocal release from all "claims, causes of action, controversies, demands . . . or claims of any kind or matter wheresoever arising out of or in any way related to the bankruptcy of ECI. In that the sale of Oxen Cove and the personal liability of Lyon to be satisfied from the sale, as well as all the actions complained of in this case as breaches of some equitable duty Campbell and the other directors owed to Lyon, were all completely and inextricably bound up with the ECI bankruptcy, this suit is barred by that release, given the Trustee, who had complete control over Lyon's interest in the corporation, under the pledge agreement.

As a further matter, even if there was continuing a claim of breach of fiduciary duty that survived despite the foregoing discussion, it is barred as a matter of law by the business judgment rule. *See, e.g., Chisholm v. Hyattstown Volunteer Fire Department, Inc.,* 115 Md. App. 58, 70 (1997) (stating doctrine). There has been absolutely no admissible evidence of bad faith, or fraud placed on the table by the plaintiff to generate a triable issue on the business judgment rule, as to each and every breach of fiduciary duty or other wrong claimed by him. See Fed. R. Civ. P. 56(e) and *Celotex, supra. See also Cummings v. United Artists Theatre Circuit, Inc.,* 237 Md. 1, 24 (1964) (burden on plaintiff under business judgment rule). When called upon at deposition to point to evidence of bad faith or fraud, plaintiff could do nothing more than repeatedly mention the history of disputes between himself and the Campbell faction. See Lyon depo.

at 78-86. This history of acrimony is plainly not enough to make out any triable issue of bad faith or fraud under the business judgment rule, under other substantive Maryland law, or under the federal procedural law applicable to summary judgment motions.

The Court has also considered the other counts involved in plaintiff's first amended complaint (there being no second amended complaint before the Court), but finds that none of the plaintiff's allegations of violation of various parts of Maryland's Corporations and Associations Code is actionable, either because they are barred by application of the business judgment rule under Corps. & Ass'ns Code Ann. § 2-405.1, or because, as to § 3-413, there is no showing of any illegal oppressive, or fraudulent act by the corporate directors. In fact, defendants' good faith is patent, in that there is not only an absence of evidence of bad faith on this record, but the fact of the matter is that the sale after Lyon's removal from the board brought in twice the amount that Lyon pushed for as a director of the corporation while harboring a secret agenda.

To the extent not specifically discussed hereinabove, the Court finds that none of the plaintiff's allegations in his first amended complaint or contentions in his motion for summary judgment or in opposition to defendants', motion has any merit.

In short, this is a lawsuit -- perhaps like some of the others in which these parties have been involved over the years -- that should not have been brought in the first place. By saying so, the court is NOT inviting a motion under Fed. R. Civ. P. 11 or any other filing that will prolong of this litigation, and any attempt to do so will be looked upon with disfavor.

An appropriate Order will be entered separately, granting the defendants motion for summary judgment, denying the plaintiff's motion for summary judgment, and entering judgment in favor of the defendants, against the plaintiff, with costs.

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge

Dated: October 1, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN W. LYON

V.

LARRY A. CAMPBELL, et al.

CIVIL NO. S 98-1129

[Entered October 1, 1999]

ORDER AND JUDGMENT

For the reasons stated in the foregoing Memorandum Opinion, it is, this 1st day of October, 1999, by, the Court, ORDERED and ADJUDGED:

1. That the defendants' motion for summary judgment BE, and it hereby IS, GRANTED;

2. That plaintiff's motion for summary judgment BE, and it hereby IS, DENIED;

3. That judgment BE, and it hereby IS, entered in favor of the defendants, and against the plaintiff, with costs; and

4. That the Clerk of Court mail copies hereof and of the foregoing Memorandum Opinion to counsel for the parties.

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN W. LYON

V.

LARRY A. CAMPBELL, et al.

CIVIL NO. S 98-1129

[Entered August 5, 1999]

ORDER

Having considered the plaintiff's motion to file a second amended complaint, the defendants opposition thereto, and the plaintiff's reply, the Court finds that the plaintiff has been dilatory in asserting the claims sought to be raised in the second amended complaint, and that to allow such amendment after the close of discovery, especially in light of the history of vindictive litigation between the two principals to this dispute, would unfairly prejudice the defendants in their defense of this lawsuit and not be in the interest of justice, and it is further of the opinion that actions based on the Antonelli note are futile as clearly barred by limitations. It is, therefore, by the Court, this 5th day of August, 1999, ORDERED:

That the plaintiff's motion for leave to file a second amended complaint (incorrectly captioned as a motion for leave to amend the first amended complaint) BE, and it hereby IS, DENIED.

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN W. LYON

V.

LARRY A. CAMPBELL, et al.

[Entered June 15, 1999]

ORDER

Upon consideration of the plaintiff's motion for leave to amend complaint, and the opposition thereto, the motion is hereby GRANTED.

SO ORDERED, this 15th day of June, 1999.

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN W. LYON :

V. : CIVIL NO. S 98-1129

LARRY A. CAMPBELL, et al. :

MEMORANDUM AND ORDER

In this latest battle in the marathon litigative war between the Lyon and Campbell interests, Mr. Lyon sues a number of Campbell-interest defendants over a real estate transaction involving Oxon Hill Manor, a piece of real property that sat unsold on the market for years. The property belonged to a corporation called L-C, Inc., which later became wholly owned by ICE. L-C was incorporated by Mr. Lyon and Mr. Campbell. Mr. Lyon and Mr. Campbell also were the incorporators of ICE. (It is not clear to the Court at this point who the present equity owners of the corporations are, or what their stakes are.) Mr. Lyon claims that he attempted to negotiate a contract for the sale of the Oxon Hill Manor parcel, on behalf of L-C, to the Correction Corporation of America (presumably for the erection of a jail). There was discussion of an option to purchase the parcel at 2.5 million dollars. Lyon claims that Campbell, insisting that the property was worth more (between 6.5 and 7 million dollars), thwarted the sale. Lyon claims that, in May, 1995, he was ousted as a director of L-C, Inc. Thereafter, L-C, Inc., sold the property for 4 million dollars. (It is impossible to ascertain from the complaint that Mr. Lyon claims any injury on account of the amount of the sale price; indeed, he could hardly complain about it, as it exceeded the price he had tentatively negotiated by a large sum.)

In this diversity lawsuit, Lyon predicates his claims upon an alleged withholding of information about the sale and of information about the disposition of the proceeds. He also claims some sort of harm -- involving, *inter alia*, tax consequences -- flowing from the disbursement (or lack thereof) of the proceeds. The defendants have moved to dismiss. The briefing is complete, and no oral hearing is necessary. Local Rule 105.6, D. Md.

Count I makes a claim for conversion. It fails to state the essential elements of conversion under Maryland law, which include an allegation that property in which the plaintiff has a present possessory interest has been taken. *See, e.g., Interstate Ins. Co. v. Logan*, 205 Md. 583, 588 (1954). There is no authority to support plaintiff's position that, lacking any present possessory interest in specific property, he nonetheless is a proper plaintiff in a conversation action. The plaintiff cannot, under the facts pleaded in his complaint, make out a case for any present possessory interest in the proceeds from the sale, whether proceeding under a theory of actual or constructive conversion. Under either theory, a plaintiff, must, first, show a present right to possession, which simply has not been done here. The mere fact that plaintiff is a stockholder and former director of a series of corporations that owned the land and received the proceeds of sale is plainly insufficient to give him a possessory interest in any identifiable proceeds, which denies him the standing to maintain a conversion action under Maryland law. To the extent he argues that the defendants have a duty to turn over money to him, the Court notes that it is well-settled under Maryland law that the nonfeasance or neglect of a legal duty regarding property does not a conversion make. *Western Md. Dairy v. Md. Wrecking Co., etc.*, 146 Md. 318, 328-29 (1924). Count I is fatally deficient under Maryland law and cannot be cured.
Turning to Count II, the Court knows of no authority for the proposition that the formation of a corporation is accompanied by an implied contractual provision with

regard to the distribution of corporate assets, short of liquidation. Such duties as are attendant upon corporations and their officers and directors are matters of statute in Maryland, an elsewhere, given that all corporations are creatures of statute. Certainly, the plaintiff has not cited any authority that such a contractual term is recognized under Maryland law, whether as a term implied in fact or in law. The Court is not saying that an action cannot be maintained in Maryland for breach of an implied covenant, but the implied covenant must be one that is recognized in law. The plaintiff has failed to allege any such covenant in Count II or to identify any provision of Maryland common, case, or statutory law wherein one may be found. Thus, Count II will be dismissed, with prejudice.

Count III will not be dismissed. Maryland clearly recognizes a cause of action for breach of a fiduciary duty by a corporate officer or director. The allegations of the complaint with regard to the fiduciary duty claim are that, because the defendants have wrongfully failed to pay over to Mr. Lyon his "share of the proceeds" of the real estate deal, have failed to "wrap up" the sale, and have failed to respond to his requests for information, they have breach the duty they owed, as officers and/or directors of the two corporations, to Lyon, as a stockholder. Count III also appears to assert some sort of derivative action on behalf of the corporations, but the Court is hard-pressed to discern its outlines, as the land deal brought in far more money than Lyon's deal would have.

There are, though, sufficient allegations under Maryland law to survive a Rule 12 (b) (6) motion as to Count III. To be sure, many factual and legal issues remain unsettled, but they are better addressed on summary judgment, when more facts will have been adduced.

To summarize, Counts I and II are dismissed, with prejudice, and Count III is retained, without prejudice to a motion for summary judgment at the conclusion of discovery. Defendants are to answer Count III within 30 days of the date hereof.

The Court wants to make one thing very clear. Fed. R. Civ. P. 11(b) (1) prohibits the institution and maintenance of, *inter alia,* harassing litigation or litigation instituted for an improper purpose. This Court has already held that Counts I and II are meritless. If it turns out that Count III has insufficient merit to withstand summary judgment, the Court will have to decide whether sanctions ought to be imposed on Mr. Lyon and/or his attorney for the filing and/or maintenance of this lawsuit, which may well be yet another volley in a never-ending war that is coming to resemble the feud between the Hatfields and the McCoys, fought not in the Appalachians, but in numerous courts throughout this state.

ALL THE ABOVE SO ORDERED, this 18th day of November, 1998.

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: April 23, 2002

No. 01-1694
CA-98-1129-S

JOHN W. LYON,
Plaintiff-Appellee,

v.

LARRY A. CAMPBELL,
Defendant-Appellant,

and

EDWARD W. STORKE;
ROBERT B. COOK,
Defendants.

[ENTERED: April 23, 2002]

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court
/s/ Patricia S. Connor
CLERK

RECORD NO. 01-1694

In The
United States Court of Appeals
For The Fourth Circuit

JOHN W. LYON,
Plaintiff - Appellee,

v.

LARRY A. CAMPBELL,
Defendant – Appellant,

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT BALTIMORE

PETITION FOR REHEARING
WITH PETITION FOR REHEARING *EN BANC*

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STATEMENT OF PURPOSE

Appellant seeks a rehearing *en banc* because the panel overlooked material factual and legal matters, the opinion conflicts with an earlier decision of this Court, and the decision incorrectly determines questions of exceptional importance. F.R.A.P. 40 (a) (2); Local Rule 40(b).

Specifically, the Panel's approval of the District Court's ruling, allowing a direct action by Lyon as a shareholder of I.C.E., Inc against Campbell as a director/co-shareholder of I.C.E., Inc. on the basis of a finding that Campbell owed Lyon a fiduciary duty, cannot stand scrutiny under even the most basic analysis of long-standing Maryland law, dating at least from the Maryland Court of Appeal's decision in Waller v. Waller, 49 A. 2d 449 (Md. 1946). Waller, while given lip service in the Panel decision for its explication of the procedures necessary to assert a shareholders derivative action, is totally ignored for its admonition that a shareholder in an almost identical position to Lyon was obligated to proceed derivatively. Instead the panel's decision essentially abrogates Waller without even a discussion of its core holding. Moreover, the Panel decision conflicts with an earlier decision of this Court, Armstrong v. The Frostie Company, 453 F.2d 914 (4th Cir. 1971).

The decision also runs afoul of the basic tenet that requires a plaintiff to prove his case. Here, in a distorted analysis of shifting burdens of proof, both the Panel and the District Court failed to notice that Lyon did not produce even the most minimal proof that his ownership of stock in I.C.E., Inc., the basis of all his claims, entitled him to a distribution under existing Maryland law regarding distribution of corporate assets; Lyon was not a shareholder in L-C, Inc., the recipient of the funds which were the subject of this case.

Such a dramatic alteration to the playing field ought not to be made at any time, let alone just before the start of a trial. Here Appellant did not have the benefit of the presumptions he had expected concerning his own conduct, was subjected to a higher burden of proof and to a direct action by his co-shareholder in I.C.E., Inc., where that shareholder was not required to meet any burden other than demonstrating that he owned stock in I.C.E., Inc. This pill is especially bitter to swallow because Lyon perjured himself **in both the District Court and this Court**, yet he has been awarded almost a million dollars as a benefit from that perjury and the material alterations the District Court and the Panel have made to existing Maryland law.

BACKGROUND

Appellee John W. Lyon ("Lyon") claimed that Appellant and long-time enemy, Larry A. Campbell ("Campbell"), and two other directors of L-C, Inc., Edward Storke and Robert Cook, had breached both common law and statutorily created fiduciary duties to him in the distribution of the proceeds of the sale of property owned by L-C., Inc., a Maryland Corporation wholly owned by another corporation, I.C.E., Inc., of which Lyon and Campbell each owned 50%.

Lyon prayed a jury trial on his claims, made directly against Campbell and the other directors. Campbell answered and prayed a jury trial as well. Just before trial, the District Court determined that Lyon could not proceed derivatively because he failed to comply with F.R.Civ. Pro. 23.1, and ruled, instead, that he could proceed on a direct cause of action for Imposition of a Constructive Trust (J.A. 211). Finding this to be a purely equitable action, the Court determined that this cause of action would be tried before him, instead of a jury, beginning the next business day.

Before the trial began, Campbell objected to this change in the course of the proceeding, noting that it would shift the burden to him of demonstrating his right to retain the funds. Campbell also objected that he would be deprived of the benefit of the presumptions under the business judgment rule. The District Court then held that the business judgment rule would no longer apply because the action was "no longer a statutory action" [J.A. 215] (referring to his carrier dismissal of the statutory breach of fiduciary duty claim brought by Lyon which the Panel has now declared was the cause of action tried here).

A bench trial was held and the District Court, applying the shifting burden of proof and the higher standard of clear and convincing evidence, found a constructive trust in favor of Lyon. On appeal, the Panel affirmed the District Court, holding that the case tried was one for breach of fiduciary duty pled by Lyon and that only the remedy of constructive trust was applied. The Panel misstated the facts when it asserted that Campbell was the de facto controlling shareholder and that he effectively dominated the L-C board. In fact, the evidence showed that neither Campbell nor Lyon were shareholders of L-C, Inc. Moreover, there was no such finding by the District Court and no evidence put forth by Lyon that would have demonstrated that; the assertions that the other directors, as testified to by Mr. Cook, exercised their business judgment were never challenged, yet the Panel concluded that Cook was in Campbell's pocket. Finally, even if the Panel was correct in asserting that, under these facts, Lyon was owed a fiduciary duty by Campbell, it was nevertheless a misapplication of clear Maryland law both to permit him to bring this action directly and to fail to require he prove, even in some minimal way, that the funds would have been disbursed to him.

ARGUMENT

I. THE PANEL'S DECISION THAT LYON HAD PROPERLY SUED CAMPBELL ON A DIRECT CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY EMASCULATES LONGSTANDING MARYLAND LAW THAT SUCH ACTIONS MUST BE BROUGHT DERIVATIVELY, IF AT ALL.

The Panel has taken some very limited dicta from Toner v Baltimore Envelope, 498 A.2d 642 (Md. 1985) and Cooperative Milk Service v. Hepner, 81 A.2d 219 (Md. 1951) and essentially abrogated Maryland law. Despite the dicta in Toner - which dealt with an equal opportunity of stock buy-back from minority members - and Cooperative Milk - which involved Hepner suing a milk cooperative to recover the difference between amounts paid to him for some shipments versus amounts he would have received from certain other members of the same cooperative - the primary holding of Waller v. Waller, 49 A.2d 449, 454 (Md. 1946), is still the law in Maryland and no amount of massaging by the District Court or the Panel should change that.

Long ago, in Waller, Maryland's Court of Appeals established the fundamental test for deciding whether a stockholder has standing to sue individually. In Waller, the plaintiff, as a stockholder in a small corporation, like I.C.E. here, claimed that defendant, a director and fellow stockholder, had made certain decisions in a deliberate effort to diminish the value of plaintiff's stock, force him and the corporation into financial trouble and bankruptcy, and take control of the corporation they jointly owned. Id. at 451. The Court determined that, regardless of the intent of the defendant-director/shareholder, in a suit against that director/shareholder for acts that resulted ***in a diminution in value of stock*** of the corporation, a stockholder may only sue derivatively inasmuch as the cause of action was the corporation's, not the individual stockholder's. Id. at 452.

The Panel determination ignores significant and long-standing Maryland precedent in affirming the District Court's post hoc rationalization for awarding Lyon, a repeated perjurer as found by the District Court, close to One Million Dollars in damages. Among the precedent ignored are the following:

- "Where directors commit a breach of trust, they are liable to the corporation, not to its creditors or stockholders, and any damages recovered are assets of the corporation, and the equities of the creditors and stockholders are sought and obtained through the medium of the corporate entity." Waller at A. 2d at 452. Here, the Panel is blessing such a direct cause of action.

- "The rule is applicable even when the wrongful acts were done maliciously with intent to injure a particular stockholder." Id.

- The panel appears to justify discarding the Waller rule by fashioning itself as the protector of a minority shareholder/director (Appellee) who was being subjugated to the whims of a majority shareholder/director (Appellant). Waller, however, addressed this situation over fifty years ago and the law has not changed:

  "...while stockholders have no legal title to the corporate assets, they are nevertheless the equitable owners thereof. Consequently, upon failure of a corporation to institute or prosecute suit against an officer for breach of trust, a court of equity in a proper case will allow suit to be brought and maintained by any stockholder for the benefit of the corporation. ***Such cases usually arise where the directors own or control a majority of the shares of stock, perpetuate***

> ***themselves in authority, and defy the minority,*** and thus the stockholders would be without remedy unless the court interposed its aid." Waller at A.2d 453 (citations omitted, emphasis added.).
>
> The Court of Appeals also made clear in Waller that "...[I]t is generally stated that directors occupy a fiduciary relation to the corporation and all its stockholders, but they are not trustees for the individual stockholders." Id. at 454. The District Court made Appellant that very trustee, imposing a constructive trust on him - for the benefit of another shareholder, completely ignoring Waller and the corporate form. The Panel, in approving what the District Court did, appears to have simply glossed over long standing Maryland law on the mechanisms required to be used by stockholders who seek redress against directors of a corporation. Here Lyon attempted to bring a derivative action against the directors, but failed to properly do so. His derivative claims were properly dismissed.

There is no dispute that Lyon's allegation against Campbell and the other directors was that they - AS DIRECTORS - unlawfully distributed proceeds of the sale of L-C's only asset to Campbell, despite Lyon's assertion that he was entitled to one-half of the proceeds through his 50% ownership interest in L-C's parent, ICE, the sole shareholder of L-C. Lyon's entire claim rested on his 50% stock interest in ICE and his sole assertion was that defendants breached their fiduciary duty to him (Lyon) by failing to pay him his share of the sale proceeds based on that 50% stock interest in ICE.

In Waller, the Maryland Court of Appeals held that the only exception to the rule prohibiting direct actions occurs when the directors commit "acts which are violations of a duty arising from contract or otherwise and owing directly from the officer to the injured stockholder." Id. at 453. Lyon, however, never claimed any such "duty arising from contract or otherwise" because there is none.

As noted above, this Court has previously recognized the force of the decision in Waller and adopted the same rationale in Armstrong v. The Frostie Co., 453 F.2d 914 (4th Cir. 1971) (a case actually citing Waller and holding where a cause of action arises from actions of the directors or officers of a company, the only correct plaintiff is the corporation) and Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel, 20 F.3d 1311 (4th Cir. 1994) (holding the advantage to corporate status is that stockholders are shielded from direct liability for acts of the corporation, thus if stockholders choose this type of protection through the purchase of stock, and the value of the stock diminishes, it is "well settled law" that a stockholder will not have standing if the wrong or injury is to the corporation and the result is a diminution in the value of the stock). This decision clearly is in direct conflict with both Armstrong and Smith Setzer & Sons.

And even if Waller were ever in doubt, the Court of Special Appeals certainly erased it in its 2001 opinion, Danielewicz v. Arnold, 769 A.2d 274 (2001), which (completely unmentioned in the panel decision) involved a small, minimal shareholder corporation. The Court of Special Appeals wholeheartedly endorsed the Waller analysis as well-established Maryland law, noting, of special interest here, "the rule is applicable even when the wrongful acts were done maliciously with intent to injure a particular stockholder. Danielewicz, A.2d at 283. The Danielewicz court aptly summarized the defendant's pleadings in that case as follows:

> Appellant also avers that Diane Arnold and George Arnold breached their fiduciary duties of loyalty, disclosure, and good faith to Appellant when they participated in and consented to the August 1987 transaction that diluted Appellant's interest in AFS and achieved a shift in the controlling interest in AFS from Appellant to George Arnold (and ultimately to Diane Arnold following George's death)....The Court's decision in Waller is dispositive of the present case on the issue of appellant's standing to sue in a capacity as an individual stockholder. Id. at 285.

It is clear that Lyon and his counsel had every opportunity to attempt to bring an appropriate claim (although Campbell does not concede that it would have been appropriate under these facts and circumstances for Lyon to sue for a constructive trust in his own name). Lyon simply failed to do so. It is not this Court's - or any other's - obligation to provide him with a cause of action that abrogates long standing state law. The Panel determination ought to be reconsidered.

The policy implications of interpreting Toner and Cooperative Milk to mean that stockholders in small or closely held corporations owe each other fiduciary duties, which are immediately and directly actionable in a court of law, are mind-boggling. Every decision in a corporation whose shares are held by two, three or four individuals now risks suit if the majority takes action that the minority disagrees with. Ironically this holding would have allowed Mr. Campbell to sue Mr. Lyon for trying to sell the property at a discount in order to satisfy his (Lyon's) obligation in a suit brought against Lyon for bankruptcy fraud. All disgruntled shareholders can bring suit directly against corporate directors who also own shares (usually the case in small corporations) by alleging a breach of fiduciary duty.

Federal Rule of Civil Procedure 23.1 would be rendered meaningless by the Panel's holding; Maryland law has been destroyed. It should be reconsidered.

II. Even Assuming That Lyon Can Sue Directly, Since His Right To Any Funds Arises Solely From His Ownership Of Stock In I.C.E., Inc., He Cannot Recover Without Producing At Least Some Evidence That The Funds Would Have Been Distributed To Him By I.C.E., Inc.

The District Court failed to make Lyon prove a single fact beyond his ownership of stock in I.C.E., Inc. and the fact that L.C. distributed the funds to Campbell. Whether the cause of action was for breach of fiduciary duty with a constructive trust remedy or, as the District Court held, for imposition of a constructive trust, the analysis is the same. At a minimum, Lyon has to demonstrate his entitlement to the funds. In this case that means proof that, once the funds came into the possession of I.C.E., Inc., they would have been distributed to him. The District Court, and later the Panel decision, simply assume that the L-C funds, owned by I.C.E. Inc as the 100% owner of L-C, Inc., would have been available for distribution to Lyon.

Maryland law is clear that before there can be a distribution to a shareholder in a liquidation, the assets must be applied to satisfy and discharge all existing debts and obligations of the corporation. MD CODE ANN., CORP. and ASSOC. §3-410(b). While there has been much discussion and analysis of Campbell's failure, in both the District Court and here, to demonstrate that his payment to Antonelli/Broyhill to achieve release of the Antonelli lien on the L-C property was payment of L-C corporate obligations, there has been no discussion whatsoever of Appellant Campbell's assertion that Lyon failed to even attempt to demonstrate that the parent, I.C.E., Inc. (to whom the funds first belonged), had no debts or obligations that had to be paid before the funds could be distributed to him.

Lyon produced no evidence whatsoever about the status of I.C.E., Inc.; he utterly failed to meet even the most basic burden. Neither the District Court nor this Court can assume any facts about who I.C.E.'s directors were or whether I.C.E. had other creditors who had to be paid first. This is another unfortunate infirmity arising from permitting the direct action and sloppily applying the shifting burdens of proof - the Court shifted the burden before requiring Lyon to prove even a de minimus case. It should be reconsidered.

CONCLUSION

It may well have been within the discretion of the District Court to render a decision that rewards Lyon's perjury. It ought not be, however, within anyone's discretion to reward that perjury by abrogating clear Maryland law and the most basic tenets as to burdens of proof. This decision is unjust and should not stand.

Dated: April 11, 2002

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

JOHN W. LYON,	*	
Plaintiff	*	
v.	*	Case No. S-98-1129
LARRY A. CAMPBELL, et al.	*	
Defendants	*	

* * * * * * * * *

NOTICE OF APPEAL

Notice is hereby given that Defendant, Larry; A. Campbell, in the matter of John W. Lyon v. Larry A. Campbell, et al., Case, No. S-98-1129, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the final judgment entered against Defendant Campbell on April 25, 2001.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

JOHN W, LYON,
Plaintiff,

v. Case No, S-98-1129

LARRY A. CAMPBELL, et al.,
Defendants.

[Entered: May 3, 2001]

DEFENDANT LARRY A, CAMPBELL'S MOTION FOR A NEW TRIAL OR TO AMEND JUDGMENT

Comes now Defendant Larry A. Campbell, through undersigned counsel, and hereby moves, pursuant to Fed. R. Civ. P. 59, for a new trial or for a reconsideration and amendment of the final judgment entered on April 25, 2001. The grounds for this Motion are fully set forth in the accompanying Memorandum.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

JOHN W, LYON,
Plaintiff,

v. Case No. S-98-1129

LARRY A. CAMPBELL, et al.,
Defendants.

[Entered: May 3, 2001]

MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL, OR TO AMEND JUDGMENT

Defendant Larry A. Campbell submits the following Memorandum in support of his Motion for a New Trial, or to Amend the Judgment, and states:

INTRODUCTION

It is respectfully submitted that this Court should reverse its verdict in this case because it rewards the perjurious testimony of Plaintiff John W. Lyon and because it is premised upon a cause of action for constructive trust that was never pled by Plaintiff but, rather, was first articulated by this Court less than one business day before the scheduled trial and two years after this Court lad denied Plaintiff's Motion to File a Second Amended Complaint- -a decision Which was affirmed on appeal by the Fourth Circuit Court of Appeals. The change in the operable cause of action in the eleventh hour severely prejudiced the Defendant by shifting the burden of proof on the eve of the trial from the Plaintiff (by a preponderance of the evidence) to the Defendant (by clear and convincing evidence). This inequitable result is compounded by the frat that this Court, which presided over the trial as a court of evil awarded the

Plaintiff nearly $1 million in spite of his clearly perjurious testimony related to the alleged payment by him of corporate obligations and punished the Defendant, who has only a sixth grade education, for testifying truthfully that, with respect to those very same corporate obligations, he paid because he felt both a moral and legal obligation to repay the corporate debt that encumbered the corporate property that was at the center of this dispute. For the reasons explained in more detail below, it is submitted that justice, fairness and equity can only be done in this case by directing the entry of a new judgment so as to deny the Plaintiff any relief.

I. Summary of Relevant Facts

A. The Court Clearly Found the Testimony of Lyon and Antonelli Incredulous

During closing arguments, this Court stated quite clearly:

> THE COURT: I **don't believe for one minute that he** [Lyon]. **paid Campbell's half [of the Antonelli debt]. I think that's just a lie. But move on. (page 28 of transcript from closing arguments)**

Defendants submit that this finding by the Court should be the finding of fact upon which the entire case rests, and indeed, upon which Mr. Lyon's house of cards falls. The Court is urged to not lose sight of the importance of its finding. The Court is also urged to not lose sight of the fact that the Plaintiff's perjured testimony about this essential fact was perpetuated before the Fourth Circuit as well.

As this Court is aware, Mr. Lyon moved to file it Second Amended Complaint in this case, shortly before the close of discovery. As part of his Motion, Plaintiff attached an affidavit from Dominic Antonelli alleging that Mr. Lyon had paid not only his half of the Antonelli debt, but Mr. Campbell's half as well.[1] Portions of that affidavit read as follows:

> 5. Prior to 1990, Mr. Lyon paid me the entire amount of the money I paid to purchase the notes, plus interest.
>
> 6. In 1990, in connection with le see of Millville Quarry, Mr. Campbell paid me one-half of the total amount owed to me for purchasing the bank notes (plus the interest obligation). This was Mr. Campbell's one-half share of the joint obligation of Mr. Campbell and W Lyon to me.

The Antonelli Affidavit was but the groundwork for the testimony of both Lyon and Antonelli at trial. Put in its' proper context, and with the benefit of cross examination at trial, that testimony proved to be false as this Court clearly found. Mr. Lyon sealed his own fate when he testified falsely and this Court should not now reward him for doing so.

The decision of this Court in Green v. Mayor and City Council of Baltimore, 198 F.R.D. 645 (D. Md. 2001) is illustrative. In Green, a case dealing with the filing of false notarizations; at the summa, judgment stage, the Court stated that:

---

[1] The Antonelli affidavit was also attached to Plaintiff's Motion for Summary Judgment and included as a designation in the Joint Record Extract before the 4th Circuit. It is attached hereto as Exhibit I for convenience of the Court.

> The prejudice to the integrity both of the process of adjudication in general and of this Court in particular, which relies on the trustworthiness of those who submit - not to mention notarize - affidavits, is manifest. The public interest in preserving the trustworthiness of sworn documents as part of be process of orderly adjudication demands that the strongest means available be taken to redress the situation in this particular case and to deter similar misconduct by others. Id. 198 F.R.D. at 647.

That case was dismissed for the attempt to perpetrate a fraud on the Court. The Plaintiff in this case, therefore, should not be permitted to profit to the tune of almost one million dollars for his fraud on two federal courts.

The Antonelli affidavit was originally submitted in support of Plaintiff s request v) allow an additional count for "contribution" on the Antonelli debt. This Court denied the motion to file that second amended complaint, and the Fourth Circuit affirmed that ruling. However, in ruling against Appellees/Defendants regarding the district court's reliance on the business judgment rule, the Fourth Circuit cited to the same affidavit containing the clearly perjurious, statements:

> Lyon has proffered sufficient evidence to rebut this presumption. Lyon proffers at least the following: (1) the L-C directors would not provide Lyon with information about what happened to all of the proceeds from the Oxen Cove sale, (2) Campbell admitted that he would not communicate with Lyon (or his representative) about the sale, and (3) *although Campbell claims he was entitled to reimbursement for his payment of certain notes guaranteed by him and Lyon, the holder of the notes says that they*

> *were paid off- on a 50-50 basis by Lyon and Campbell - well before the Oxen Cove sale.* Lyon v. Campbell, No. 99-2455, slip opinion (4 Cir. 2000) (emphasis added).

The evidence here has made it patent that Mr. Lyon needed a way to explain the $2 million dollar kickback which he received from Mr. Antonelli from the closing of Millville Quarry in 1990. Otherwise, both Lyon and Antonelli had perpetuated a fraud on the company and on NW Campbell. Enter the "refund" explanation, i.e., that the $2 million received by Mr. Lyon from Mr. Antonelli simply represented a refund of the money previously paid by Mr. Lyon (for Mr. Campbell's share of the corporate debt). The problem with this theory, perpetuated on both this Court and the Fourth Circuit, is that the sworn documentation and prior testimony contradict MY Lyon and W. Antonelli and every turn as this Court so clearly concluded.

B. The Plaintiff Never Pled A Cause of Action for Constructive Trust

The injustice of awarding Plaintiff well over $900,000 despite his perjury is compounded by the fact that the award is based upon a constructive hint theory, first propounded by this Court immediately before trial. That theory was never pled by Plaintiff except, arguably, in his last-minute attempt to file a Second Amended Complaint which van rejected by this Court and which was affirmed on Appeal by the Fourth Circuit Court of Appeals. Though pled as a contribution count, it was the only time in this case that Plaintiff even came close to alleging the required elements of a constructive trust cause of action, i.e., that Mr. Campbell received all the proceeds and Lyon should be awarded "his-half." The contribution count was apparently the Plaintiff's effort to capitalize further on the Lyon-Antonelli tale that 11% Lyon had paid off the entire debt.

This Court properly rejected that attempt because Plaintiff was dilatory at the time and because of the potential prejudicial effect on Defendants, coming at the very end of discovery. That rejection was affirmed by the Fourth Circuit and became the law of the case. Then this Court, in essence, revived that long-dead cause of action without permitting Defendants any chance to take additional discovery before trial.

Prior to the start of the trial on Monday morning, this Court asked Defendants to immediately cite to the Court what prejudice, if any, the Defendants would suffer by proceeding on the constructive trust theory, which had never been mentioned prior to the Friday afternoon hearing. The defense indicated that the shifting burdens appeared to put the defense in a much more vulnerable posture. That potential prejudice proved to be very real indeed, and the harm to Defendant Campbell is self-evident, based on the Court's rationale for its verdict that Campbell failed to meet the elevated burden of proof thrust upon him by the Court long after discovery had been closed and immediately prior to trial. Up until that eleventh hour ruling, the defense had expected to be the beneficiary of the "business judgment rule," which the Plaintiff would have had the burden to overcome. Indeed, this Court had originally granted Summary Judgment on that ground, a position which the Fourth Circuit said was not appropriate at the pre-trial stage but which was not precluded as a basis for ruling at trial. In one fell swoop, however, it was as if the referee took the ball from Mr. Campbell on Mr. Lyon's ten-yard line and awarded it to Mr. Lyon on Mr. Campbell's one-yard line!

The equity of this decision, under those circumstances, should, in all fairness, be seriously reconsidered by this Court and the judgment should be altered or amended to reflect that Mr. Lyon cannot recover.

II. Summary of Applicable Law

A. Schneider v. Schneider Does Allow This Court to Deny Mr. Lyon's Relief Solely Based upon his Perjury.

This Court observed during its oral opinion from the bench that, but for the Maryland Court of Appeals decision in Schneider v. Schneider, 335 Md. 500, 644 A.2d 510 (1994), the Court was inclined to invoke the doctrine of *in pari delicto* and deny relief to the Plaintiff. Apparently, the Court based this Ending on do rationale that, although Mr. Campbell allegedly committed a wrong on Ito Lyon by not distributing stock proceeds, Mr. Lyon could be equally barred based on his penurious testimony and/or by his theft from Mr. Campbell at the Millville closing. While Defendant does not concede that he ever acted inequitably, or wrongly, toward Mr. Lyon, he does recognize that, if this Court believes that it can apply the doctrine of *in pari delicto,* it would serve to bar Mr. Lyon from relief. The Schneider case does not prevent that result, but rather, it seems to condone it.

This Court determined that Judge Rodowsky's opinion in Schneider precluded a denial of relief on the grounds of "perjury alone" by the Plaintiff. Defendant respectfully submits that, while the Court correctly interpreted Schneider as limited 'the use of the *"in pari delicto"* doctrine, that decision was narrowly devised because of overriding public policy concerns regarding spousal support that were present in Schneider. Those concerns are wholly absent here.

In Schneider, a divorced Woman sought specific enforcement of a contract for support against her former husband that was not referenced in the divorce decree. The circuit court dismissed plaintiffs complaint under the doctrine of "unclean hands" because the complaint revealed that both spouses had testified falsely in the original divorce

action as to the grounds for the divorce. The Court of Appeals reviewed application of the *in pari delicto* doctrine and narrowly framed the issue as follows:

> Under the principle illustrated by the decisions reviewed above, the ultimate question in the case before us is whether any deterrence of perjury that might be effected by refusing relief to Janet is outweighed by the policy favoring the enforcement of agreements for spousal support. Schneider, 335 Md. at 514.

In reversing, the Court of Appeals squarely rested its holding on the overriding public policy favoring spousal support, finding this policy to outweigh the strong concerns raised by the perjured testimony:

> While lying under oath is a matter of the very gravest importance in As own right, and is always punishable in proper proceedings, it appears to us to be extraneous to the issue as to how much money this husband should provide for the support of his wife... We conclude that the dismissal of Janet's complaint would do little to discourage perjury in divorce actions. Rather, under the facts alleged, dismissal would be contrary to strong public policy, because dismissal would reward the perjury of economically superior spouses by neutering their consul obligations of support to economically dependent spouses. The complaint should not have been dismissed. Id. At 517.

The Court of Appeals was clear that Schneider's application was limited to cases involving spousal support. As to non-support cases, the court readily distinguished its holding as follows:

> Even if Janet's claim to support rests on an agreement that also contemplated perjured grounds for divorce, her claim for support is not as dependent on the perjury as the claim involved in Kirkland v. Mannis, 550 Ore App. 613, 639 P.2d 671. The claim there was brought pro se by a prisoner ... against the attorney who defended him.... The Plaintiff contended that the defendant committed legal malpractice 'by unethically manufacturing a story for the defense... and causing plaintiff to relate same to the court causing plaintiff to be convicted.... In that case the court held the plaintiffs claim barred by unclean hands. Id.

The facts of this case are much more analogous to the claims in Kirkland than those in Schneider. Here, the Plaintiff has concocted numerous tales over the years in order to avoid admitting what the paper trail clearly shows, i.e., a $2 million kickback granted to him by his lifelong friend upon the sale of a business owned by Lyon, Campbell and others. Despite multiple financial statements, an IRS Offer in Compromise, and Bankruptcy papers all to the contrary, Mr. Antonelli and Mr. Lyon contended here that the $2 million was not a kickback, but a repayment to Lyon for monies he allegedly "fronted" for Mr. Campbell out of the goodness of his heart between 1984 and 1988, when Mr. Lyon and Mr. Campbell were bitter enemies. The Plaintiff has concocted this perjurious testimony to counter L-C Inc.'s Board of Directors decision to reimburse Mr. Campbell for paying off a corporate debt that encumbered the very corporate property which is at the heart of this case, rather than rewarding Mr. Lyon for his multiple thefts and frauds. This situation is completely akin to the claims of Kirkland, and the Maryland Cowl of Appeals completely supports the dismissal of claims by plaintiffs who have engaged La such shenanigans.

B. Alternatively, as I.C.E. is a Nevada corporation and Plaintiff's right to proceeds flowed through his stock ownership in this Nevada corporation, the Court should look to Nevada law to determine if the doctrine of *in pari delicto* is appropriate in this case.

I.C.E. is a Nevada corporation. Since I.C.E. is the sole shareholder of LC Inc., and I.C.E. is the company through which Plaintiffs claims must flow, this Court should also look to Nevada law to determine whether the *in pari delicto* doctrine applies. And, it does so apply.

Nevada law recognizes the doctrine and does not limit it, even in domestic relations cases. The Supreme Cowl of Nevada confirmed its agreement with the invocation of the doctrine in Smith v. Smith, 68 Nev. 10, 226 P.2d 279 (1951), a case that involved three individuals, two marriages, and a divorce decree that had been vacated. Essentially, the court considered whether it could use one party's fraudulent conduct to prevent the district court from purging its records of another's fraudulent conduct. The Court held:

> When parties are *in pari delicto*... a court will leave them where it finds them, after purging its records of the fraud practiced upon the court. The effect of the trial court's judgment in the case at bar was to apply this doctrine. It said, in effect, that it would not hear evidence of Esther's fraud as a defense against purging its record of William's fraud, but that after such purge, being precluded by the statute from entertaining William's complaint to annul his marriage to Esther, it would leave the parties as it found them. With this conclusion we are in accord. 226 P.2d 279, 287.

The case is still Nevada law. This Court, recognizing that the stock proceeds at issue here flow from a Nevada corporation, can apply it to this case and find that Plaintiff is not entitled to relief Clearly, this is what the Court said it would do, but for the Schneider decision.

C. Plaintiff's First Amended Complaint Did Not Allege a Constructive Trust And When Plaintiff Attempted to Earlier Amend His Complaint With Allegations That Could Have Arguably Constituted a Constructive Trust Theory, That Attempt was Rejected by This Court And Affirmed on Appeal.

Counsel appeared before the Court for a hearing on the Friday before the start of trial. Defendants had filed a Motion for Summary Judgment requesting judgment on the remaining counts after this Court had *sua sponte* issued a letter ruling on Wednesday afternoon of the same week barring Plaintiff from pursuing any derivative causes of action. The Court denied the defense's motion as untimely.

Then, is the surprise of both parties the Court essentially amended Plaintiffs Complaint into one for a constructive trust. Plaintiff had never mentioned a constructive trust theory in any of his prior pleadings in this Court, nor in the Fourth Circuit. Indeed, Plaintiff did not even readily acknowledge the existence of that cause of action when questioned by *the* Court at the hearing.

Defendants were caught off guard by this turn of events on the eve c& trial and, on the following Monday, registered an objection to proceeding on the constructive trust cause of action. When asked by the Court how the defense was prejudiced, counsel replied that the new cause

of action would shift the burden of proof in the case to the detriment of the defense. This concern was, of course, borne out during closing arguments before the Court when the Court noted that, if the evidence was in equipose, as Plaintiff was arguing, then Plaintiff could not prevail. Plaintiff then noted to the Court that the burden had shifted to Defendant once Plaintiff established a confidential relationship under the constructive trust theory. The Court agreed and ruled against Defendants for not satisfying is burden, a burden mat until 48 hours before trial did not exist. The exchange was as follows:

> THE COURT: Well, that's true. But, in the case where the evidence is in equipoise men the decision goes in terms of who has the burden of proof.
>
> MR. SCHERTLER: And I submit - -
>
> THE COURT: You have the burden of proof because you're claiming the trust.
>
> MR. SCHERTLER: I submit that if we look at the law, that the burden of proof changes when you have a person in a, with a fiduciary relationship, as a trustee, who is engaged in getting this corporation - - that they have two conflicting duties; one is his personal interest in getting these notes, the alleged notes, there are no notes, getting these notes paid; and, he's also got a duty at the same time as a director of this corporation.

When there is evidence of self-dealing like that, the law requires that the director show that the transaction was fair under the circumstances.

And I submit than [sic] when the evidence is in equipoise in this case, the burden falls upon the defendant to show, because of Mr. Campbell's situation, and Mr. Storke, and Mr. Cook, that the transaction was fair. It's a classic case of someone having a conflicting interest, a director having conflicting interest.

THE COURT: Well, you're right about the shifting burden under Wimmer versus Wimmer.

Previously, when Plaintiff had earlier sought to amend his complaint a second time at the close of discovery, the Court denied the union as untimely and the Fourth Circuit affirmed. In that proposed Second Amended Complaint, Plaintiff asserted for the first time, that the funds he claimed entitlement to were in Defendant's hands. He sought to bring a claim for "reimbursement" under Section 3-419 of the Maryland Commercial Law Article and one for "contribution." The relevant paragraphs of Plaintiff's Proposed Second Amended Complaint with regard to the contribution count were as follows:

46. Campbell. caused the net proceeds of the sale of the Oxen Cove property to be transferred to himself based on his claim that he had personally paid one-half of LC's debt to *Wonelli*.

47. Because Lyon had personally paid the other half of LC's debt to Antonelli, Lyon is entitled to a pro rata (one-half) contribution from Campbell of the net proceeds the [sic] Campbell had transferred to himself as reimbursement for paying off one-half of the debt

45. [sic]Lyon is therefore entitled to contribution from Campbell in the amount of one-half the proceeds paid to Campbell or $1,400,000 plus interest.

In its order denying that Motion to File a Second Amended Complaint, this Court held: "the Court finds that the Plaintiff has been dilatory in asserting the claims so sought to be raised in the second amended complaint, and that to allow such amendment after the close of discovery, especially in light of the history of vindictive litigation between the two principals to this dispute, would unfairly prejudice the defendants in their defense of this lawsuit and not be in the interests of justice..." District Court Order, Case Number S-98-1129, dated August 5, 1999.

The Fourth Circuit affirmed this Court's decision in denying the request to amend the Complaint a second time, at the close of discovery. That decision is the law of the case. By allowing the Plaintiffs to amend on the eve of trial and proceed on a theory they had never before pled with success, the Court vitiated its own prior holdings in this action (as affirmed by the Fourth Circuit) which should have been treated as law of the case. Maryland law I dear on this point.

In discussing the law of the case doctrine, the Maryland Court of Special Appeals has stated that "once a decision is established as the controlling legal rule of decision between the same parties in the same case it continues to be the law of the case." Hagez v. State, 131 Md. App. 402, 418 (2000)(affirming trial court's denial of defendant's claim that double jeopardy and prosecutorial misconduct barred retrial). Moreover, it is clear that "arguments at odds with the principles inherent in an appellate court's previous opinion are also precluded by the doctrine." Id. "Under the law of the case doctrine, once the decision of an appellate court establishes the 'law of the case', it must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal ... unless: (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work manifest injustice." United States v. Aramony, 166 F.2d 655, 661 (4th Cir. 1999)(because the court had rejected defendants argument on the first appeal, die law of the case prevented court from addressing the same argument at the second appeal)(citations omitted).

In Kline v. Kline, 93 Md. App. 696, 699 (1992), a divorce case, the appellate court stated that "once this Court has ruled upon a question properly presented on an appeal, or, if the ruling be contrary to a question that could have been raised and argued in that appeal... such a ruling becomes the 'law of the case,' and is binding on the litigants and courts alike, . . . and neither the questions decided nor the ones that could have been raised and decided are available to be raised in a subsequent appeal." In Kline, the Court of Special Appeals affirmed the order requiring sale of the home and business because they were jointly owned by the parties, but found that the amount of the contribution award to the husband was excessive. Upon remand, despite the husband's contention that he was the sole owner of the

business, the trial court ruled that the business was jointly owned and subject to sale. The trial court then ruled that the amount of contribution it had originally awarded was correct, noting that the appellate court had mistakenly assessed the award.

On the second appeal, the Kline Court held "that law of the case doctrine requires the trial judge to order the sale of the business" but again reversed the contribution award. Id. at 701. The court stated that "this appellate court's decision in Kline I is the law of the case and binding on the circuit court, as well as the parties." Id. "Although the decision may have been a miscalculation, . . . a party prejudicially affected by the asserted error may not attempt to 'correct' the error by relitigating the matter in a subsequent trial." Id.

Other appellate courts have also looked specifically to decisions regarding Complaints and Motions to Dismiss complaints, and how those rulings relate to the law of the case doctrine. In S.M.S. Textile Mills, Inc. v. Brown, Jacobson, Tillinghast, Laha and King, P.C., 631 A.2d 340 (Conn. 1993), a legal malpractice action, the trial court had stricken count three of the complaint for failure to state a cause of action for unfair and deceptive trade practices. When the plaintiff amended the complaint, the trial court determined that the previous order granting defendant's motion to strike was the law of the case. The appellate court held that the "trial court properly noted that the amended complaint was substantively the same as the previous one, and applying the law of the case doctrine, granted the second motion to strike." Id. at 347.

In Lundstrom. v. Winnebago Newspapers, Inc, 192 ME. 2d 301 (M. 1963). the defendant's motion to strike and dismiss the complaint was granted by the trial court. On the first appeal, the court reversed and remanded the action, finding that the complaint was sufficient to require an answer. Upon remand, the trial court granted a second

motion by the defendant, based on the same grounds as those contained in the prior motion. The Lundstrom Court held that the "law of the case as established by our decision in the former appeal, is that the complaint is good as against any ground specified in the motion." Id. at 311. The Court further found that the trial court's action. "constituted an evasion of [the appellate court's] mandate, and reversible error." Id.

In Jones v. McDonald's Corp., 723 Sold 491 (La 19981 a real estate action, the trial court had initially dismissed the entire complaint, but the appellate court reversed finding that plaintiff's action for damages was timely. The plaintiff then filed a second complaint, setting forth the same basic allegations. Me defendant moved to strike the allegations relating to ownership of the property based On the appellate court opinion limiting plaintiff s claim to monetary damages. Upon the second appeal by the plaintiff, the court affirmed the trial court's order striking the plaintiffs title claim. The Jones court stated that me 'law of the case doctrine is to avoid relitigation of the same issue; to promote consistency of result in the same litigation; aid to promote efficiency and fairness v) both parties by affording a single opportunity for the argument and decision of the matter at issue." Id. at 494. The court held that its prior ruling that the trial court did not err in striking the plaintiff s title claim was the law of the case and it would not review that issue on appeal.

In this matter, the additional counts in the second amended complaint were nothing but ill-pleaded versions of the cause of action that the Court suddenly bestowed upon Plaintiff on the eve of trial. Based on the doctrine of law of the case, the Plaintiff should have been precluded from proceeding on this theory based upon the Court's order of August 5, 1999 and the affirmation of that decision by, the Fourth Circuit.

D. The Unclean Hands Doctrine is Still a Defense in This Case As the Fourth Circuit's Opinion Was Limited to John Lyon's Unclean Hands In His Dealings With the Board of Directors In the April-May 1995 Timeframe.

The Fourth Circuit could not have been more clear that it was not barring the defense of unclean hands in this case, only that it was ruling on do limited issue before it from the summary judgment procedures. The Fourth Circuit stated that: "We agree with Lyon, at least at this stage." Lyon v. Campbell, supra, at 5-6. The Fourth Circuit went on to state that, "[I]t does not appear horn the summary judgment record that Lyon is barred by unclean hands because his own non-disclosure in the beginning is not sufficiently related to his claim that the L-C board wronged him at a later time." Id. at 6.

The only "unclean hands" issue before the l7otath Circuit for summary judgment purposes was do: non-disclosure by Lyon of his pledge agreement while he attempted to pressure the others to undersell the subject property. The issues of unclean hands raised at trial are far more grand in scope; in time, and in significance. It is also clear from Mr. Lyon's position in ads case that none of the issues raised at trial, i.e., regarding the payments to Antonelli, the kickbacks from Antonelli, the false statements made to the IRS, the falsities in depositions and on financial statements to creditors, or in bankruptcy papers, were ever before the Fourth Circuit because Mr. Lyon had simply maintained that those events had not occurred and, thus, they were disputes of fact that could not possibly be raised, or considered, in the first appeal of this case. Now, however, the Court should consider all of these acts as evidence of Plaintiffs unclean hands and their relation to his claim that he was wronged by the L-C Board when it made its decision to repay Mr. Campbell.

The Court seemed perplexed that its hands were tied in ruling for Mr. Lyon, despite his perjurious testimony and several contradictions to previously sworn statements and/or testimony. When Mr. Lyon's conduct is reviewed in toto, however, this Court would be on solid ground in denying Mr. Lyon any relief on the "unclean hands" principle. Indeed, the perjury that this Court has already found is alone sufficient to justify such a result.

As this very court noted in Smith v. Cessna Aircraft Company, 124 F.R.D. 103 (D.Md. 1989), a case in which a claim for lost wages was dismissed because the plaintiff manufactured false tax documents and committed perjury in support of the claim:

> 'He who comes into equity must come with clean hands.' As traditionally applied in courts of equity, this maxim is a 'self imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of defendant.' The plaintiffs conduct must be directly related to the subject of the suit. [Courts] apply the maxim requiring unclean hands only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect to the matter in litigation. They do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit, but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication ... The purpose of the maxim is not to protect

> the parties; rather, it is to safeguard the judicial process. 124 F.R.D. 103 at 105-106, (citations omitted).

In the brief period available to submit this Memorandum to the Court, the defense has located numerous examples of courts dismissing actions based on perjury, discovery abuse, or other such misconduct. Though not all inclusive, it certainly provides ample support to the defense's request that Mr. Lyon be denied relief. It is axiomatic that a court may use its inherent power to dismiss a case or vacate judgment for misconduct by a Plaintiff. See Hazel-Atlas Glass Co. v. Hartford-Empire Co. 322 U.S. 238, 244-45, 250 (1944). Further, it may exercise this power 'if a party has willfully deceived the court mid engaged in conduct utterly inconsistent vita the orderly administration of justice,' Liva v. County of Lexington, 1992 U.S. App. LEXIS 18140 (unpublished 4th Cir. 1992), quoting, North American Watch Corp. v. Princess Ermine Jewels, 786 F.2d 14479 1451 (9th Cir. 1986)); Mathis v. New York Life Ins. Co., 133 F.3d 546 (7th Cir. 1998)(case dismissed where plaintiff lied on application to proceed in forma pauperis); Archibeque v. Atchison, Topeka & Santa Fe Railway Co., 70 F.3d 1172 (10th Cir. 1995)(personal injury case dismissed because plaintiff concealed medical history and committed perjury); Pope v. Federal Express Corp., 974 F.2d 982 (8th Cir. 1992)(case dismissed because. plaintiff manufactured evidence and committed perjury); Nichols v. Klein Tools, Inc., 949 F.2d 1047 (8th Cir.1991)(case dismissed because plaintiff lied during deposition and concealed evidence); Aoude v. Mobile Oil Corp., 892 F.2d 1115 (1st Cir. 1989)(case dismissed because plaintiff attached false purchase agreement to the complaint); Penthouse Int'l, Ltd. v. Playboy Enterprises, Inc., 665 F.2d 371 (2nd Cir. 1981)(action dismissed due to perjury and refusal to comply with discovery order on the part of plaintiff); Chemtall Inc., v. Citi-Chem, Inc., 992 F. Supp. 1390 (S.D. Ga. 1998)(answer stricken because defendant lied under oath and acted in bad

faith during discover)); Derzack v. County of Ailegheny, 173 F.R.D. 400 (W.D.Pa. 1996)(action dismissed for producing-forged documents, bad faith, stonewalling and lack of candor); Vargas v. Peltz, 901 F. Supp. 1572 (S.D.Fla.1995)(action dismissed for perjury and fabrication of evidence pursuant to inherent powers of the court); Brady v. United States, 877 F. Supp. 444 (C.D.Ill. 1994)(complaint and answer to counterclaim dismissed for destruction and fabrication of evidence and perjury by plaintiff); Anheuser-Busch, Inc. v. Natural Beverage Distributors, 151 F.KD. 346 (N.D. Ca. 1993)(case dismissed because plaintiff concealed documents and committed perjury); Sun World, Inc., v. Olivarria, 144 F.R.D. 384 (E.D.Ca. 1992)(answer stricken, counterclaim dismissed and default judgment entered for plaintiff where defendant fabricated evidence and committed perjury); Boron v. West Texas Exports, Inc., 680 FSUPP. 1532 (S.D.Fla. 1988) (denied motion to vacate default judgment because affidavit in support thereof was false); Eppes v. Snowden, 656 F. Supp. 1267 (E.D.Ky. 1986)(case dismissed because plaintiff manufactured documents and persuaded witness to commit perjury); Rockdale Management Co. v. Shawmut Bad, KA. 1 63 8 N.E.2d 29 (Mass. I 994)(action dismissed because plaintiff forged documents and committed perjury); Synanon Foundation, Inc. v. Bernstein., 503 A.2d 1254 (D.C. 1986)(case dismissed where plaintiff committed fraud on the court through perjury and destruction of evidence).

The seriousness of committing perjury at trial, on an issue central to the legitimacy of one's claim, is highlighted when one simply reviews the record of cases in which claims were dismissed due to pre-trial, simply for discovery abuse and violations, such as: Valley Engineers, Inc. v. Electric Engineering, Co., 158 F.3d 1051 (9th Cir. 1998)(action dismissed due to plaintiff s failure to produce key document); Malautea. v. Suzuki Motor Co., 987 F.2d 1536 (11th Cir. 1993) (answer stricken and default entered for plaintiff where defendant failed to produce discovery

despite court order); Marrocco v. General Motors Corp., 966 F.2d 220 (7th Cir. 1992)(first case dismissed for destruction of evidence which occurred despite court order; second case judgment on liability entered for plaintiff because loss of evidence was fault of defendant even though not willful or deliberate); Hartford Fire Ins. Co. v. Leader Construction Co., 176 F.R.D. 202 (E.D.N.C. 1997)(answer stricken for failure to produce documents despite order compelling production); White v. Office of the Public Defender, 170 F.R.D. 138 (D. Md. 1997)(action dismissed for destruction of evidence during litigation); Rogler v. Phillips Builder Mental Retardation Program, 126 F.R.D. 509 (D. Md. 1989)(action dismissed because plaintiff made a mockery of discovery, refused to comply with court orders and engaged in dilatory tactics); Snead v. Automation Industries, Inc., 102 F.R.D. 823 (D. Md. 1984) (dismissal appropriate where plaintiff repeatedly engaged in evasive discovery tactics and dilatory conduct); Aerodyne Systems Engineering, Ltd. v. Heritage Int'l Bank, 115 F.R.D. 281 (D. Md. 1987)(case dismissed for history of delaying litigation, refusal to respond to discovery despite court order, responses finally given were inappropriate and inadequate); Klupt v. Krongard, 126 Md.App. 179 (1999)(dismissal of counterclaim appropriate sanction for destruction of evidence).

Here, Plaintiff began this particular chapter in the tawdry history of the dealings between the parties litigant by lying to the L-C directors (defendants here) as to his hidden personal interest in obtaining their approval of a lo ball offer for the corporate property. In discovery, Plaintiff continued his deceit by never producing the key documents that were executed between himself and the bankruptcy trustee such as the pledge agreement, the irrevocable proxy, and the irrevocable power of attorney, despite requests that he do so. The Defendants were able to retrieve these documents, however, from counsel for the Trustee.

When unable to explain the lack of production at his deposition, Mr. Lyon proffered an affidavit to the Court at

be summary judgment opining that the documents were not produced because they must have been "misfiled." The Defendants did not seek sanctions, but included this conduct as part of the background of their motion for summary judgment. This Court did not directly address this conduct, other than to say in its memorandum opinion that Plaintiff's unclean hands were "patent from the record." Yet, because Defendants were only temporarily deceived about the pledge, and were - through their own efforts - able to "cure" Mr. Lyon's discovery abuses, the Fourth Circuit held that "unclean hands" did not apply at that stage. Apparently, emboldened by these "escapes," Mr. Lyon ended his journey by telling a deliberate lie as to a crucial issue before this Court and procuring the false testimony of Mr. Antonelli on that same issue.

This court should not condone such conduct, let alone reward it.

E. Plaintiff Never Satisfied his Evidentiary Burden Showing That He Had a "Good, Equitable Claim" to the stock proceeds, and even if he did, Mr. Campbell Satisfied his Evidentiary Burden that He was Entitled to Retain the Sale Proceeds.

At closing argument and in questions from the bench, the Court appeared to focus on whether Mr. Lyon had established that a "confidential" relationship existed between Plaintiff and Mr. Campbell such that a constructive trust should be imposed. Once this question was answered in the affirmative, the Court moved on to determine whether Mr. Campbell had satisfied the shifting burden to show that he should be entitled to the proceeds. This process, however, missed perhaps the most critical step in the analysis of Mr. Lyon's claim, and that is the first element of a constructive trust, an element that Mr. Lyon had the burden of proving.

Under any derivation of a constructive trust theory, the first element of proving that one is entitled to property in the possession of another is to first establish that the individual has a good and equitable claim to the property. See, Sandler and Archibald, Pleading Causes of Action in Maryland, 2d Edition, (1998). The Defense submits first and foremost, and based on all the reasons previously noted in this Memorandum, that Mr. Lyon simply never satisfied his burden of proof as to this threshold element.

As the court noted in Plaintiff counsel's rebuttal argument, if the evidence were in equipoise, Mr. Lyon had not satisfied his burden. Plaintiff's counsel cleverly fast-forwarded the Court to the second element (the confidential relationship), and then to the third, in which the defense would then assume the shifting burden. Plaintiff's counsel never, however, addressed the fact that they had not satisfied the first element of the claim, that Mr. Lyon has a "good and equitable" claim to these proceeds. The defense respectfully submits that the Plaintiff failed utterly to satisfy this first element and judgment should be amended to reflect such. Mr. Lyon's has a "good and equitable" claim is founded upon the fact that since he paid Mr. Antonelli at least what Mr. Campbell paid, he should also then receive his "share" of the sale proceeds. The defense simply asks the Court to consider: Where is Mr. Lyon's evidence that he even paid his half of the Antonelli debt? Certainly not in his financial statements from 1986 to 1989, which noted the debt continued to be carried and even increased over time. Certainly not in his Offer in Compromise to the IRS, signed under oath, in 1987 in which he indicated that he owed nearly $7 million dollars to Mr. Antonelli BN- these very corporate obligations. Certainly, not in terms of producing a single check to Mr. Antonelli[2], nor producing any

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[2] It is also interesting to note here that although Mr. Lyon testified at this trial that he paid Mr. Antonelli with checks, his own counsel produced Plaintiffs Exhibit 99, showing a variety of forms of payment that were not limited to written checks, thus impeaching his own client.

promissory notes that were ever released by Mr. Antonelli. Plaintiff simply did not meet his burden that he had a "good and equitable" claim in the first instance before the Court was even obliged to consider the existence of a confidential relationship and the shifting burden of proof.

The defense also submits that Mr. Campbell indeed carried his burden that equity, fairness and justice require that he be entitled to keep all the proceeds of the sale. While the defense concedes that no party to these transactions followed the strictures of commercial paper or corporate law, what the defense did show was a paper trail that evidenced Mr. Campbell's equitable right to retain all the proceeds from the Oxen Cove sale. In summary, the defense produced, inter alia, the following:

(i) Documentary evidence that Mr. Antonelli had purchased notes evidencing corporate debt to I.C.E., Inc. and L.C. (the I.C.E. obligations) to various lenders, and evidence that the L.C., Inc. property was pledged as security for those notes (Defendant's Exhibits 58 and 59)

(ii) An Agreement between Mr. Campbell and Mr. Antonelli in which Mr. Campbell severed his obligation to Mr. Antonelli from that of Mr. Lyon's, while reaffirming, in essence, his already existing personal obligation to repay Mr. Antonelli because he and Lyon had personally guaranteed the I.C.E obligations. (Defense Exhibit 73)

(iii) The closing sheet from the sale of Millville Quarry, clearly demonstrating payment from Mr. Campbell (via Mr. Broyhill) to Mr. Antonelli of the loan obligation (Plaintiff's Exhibit 91;), as well as Mr. Antonelli's and Mr. Campbell's testimony to that effect

(iv) The assignment of Mr. Antonelli's interests in the I.C.E obligations to Mr. Broyhill (Defense Exhibit 67);

(v) The releases of proper,, liens executed by Mr. Broyhill, allowing the sale of Oxen Cove to go forward. (Defense exhibits 46 and 47);

(vi) The admissions from both Mr. Lyon and Mr. Antonelli that Campbell had in fact paid his share.

This evidence establishes, even by a clear and convincing standard, that Mr. Campbell paid the corporate debt that ultimately led to the release of hens on the Oxen Cove property. The Board of Directors were aware of this fact. The Board of Directors correctly determined that Mr. Campbell should be reimbursed for the payment of these corporate obligations. Had there been an additional 5 million dollars left from the sale of Oxen Cove, then perhaps *those* additional proceeds, after paying off the corporate debts, would have been subject to some sort of distribution to stockholders. Here the amount of money left still failed to make Mr. Campbell completely whole, but it helped reduce the debt owed to him.

CONCLUSION

For all the aforementioned reasons, the Defendant, Larry Campbell respectfully requests that this court reconsider its prior holding in this case and alter or amend the judgment to reflect that Plaintiff is either barred from or not entitled to any recovery.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of May 2001, copies of Defendant Larry Campbell's Motion for a New Trial and/or to Amend Findings of Fact and Conclusions of Law and Memorandum in support thereof were forwarded via first class mail, postage prepaid to:

Barry Coburn, Esquire
David Schertler, Esquire
Coburn & Schertler
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Attorneys for Plaintiff,
John W. Lyon

/s/Gerard P. Martin
Gerard P. Martin

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND,
SOUTHERN DIVISION

JOHN W. LYON
Plaintiff,

v. Civil No. S-98-1129

LARRY A, CAMBELL, et al.
Defendants.

AFFIDAVIT OF DOMINIC F. ANTONELLI

I, Dominic F. Antonelli, hereby certify that:

1. I am over twenty-one years of age.

2. I have personal knowledge of the facts set forth in this affidavit and am competent to testify to these facts.

3. In the late 1970s and early 1980s, Larry Campbell and John Lyon entered into a number of promissory notes with National Bank of Washington ("NBW') and National Savings & Trust ("NBW") in order to borrow money for their jointly owned company, Excavation Construction, Inc. ("EC"). Mr. Campbell and W Lyon personally guaranteed these loans.

4. EC went bankrupt and was unable to pay these loans. In order to prevent the banks from instituting legal action against W Campbell and Mr. Lyon, I purchased the notes from the banks. Mr Campbell and Mr. Lyon promised me that they would pay me back the money it cost me to purchase the notes from the bank, with interest.

5. Prior to 1990, Mr. Lyon paid me the entire amount of the money I paid to purchase the notes, plus interest.

6. In 1990, in connection with the sale of the Millville Quarry, Mr. Campbell paid me one-half of the total amount owed to me for purchasing the bank notes (plus the interest obligation). This was Mr. Campbell's one-half share of the joint obligation of Mr. Campbell and Mr. Lyon to me.

7. The net result was that Mr. Campbell and Mr. Lyon each paid me one-half of EC's outstanding obligation to me as a result of my purchase of the bank notes taken out for the benefit of EC. I considered the total debt satisfied and paid.

I hereby certify under the penalty of perjury that the foregoing Affidavit is true.

FURTHER THE AFFIANT SAYETH NOT.

/s/Dominic F. Antonelli
Dominic F. Antonelli

Dated: June 25, 1999

Notarized and sworn before: June 25, 1999

/s/Martha F. Castell
Martha F. Castell

MY COMMISSION EXPIRES
May 14th 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MARYLAND

JOHN W. LYON

plaintiff

vs. Civil No. S-98-1129

LARRY A. CAMPBELL, et al.,

defendants

April 24, 2001
Baltimore, Maryland

BEFORE: His Honor, Frederic N. Smalkin.

APPEARANCES

For the plaintiff:

David Shertler
Barry Coburn

For the defendants:

Gerard P. Martin
Thomas Zagami
Steven Wrobel

* * *

THE COURT: Any redirect?

MR. MARTIN: No, sir.

THE COURT: All right, Mr. Weiner, that is all. You're excused, sir. Thank you very much.

THE WITNESS: Thank you.

MR. MARTIN: Your Honor, could I have about five minutes to go over my exhibits, and frankly to go to the bathroom? I think we're ready to close. I just need - - I think we have some deposition testimony we want - -

THE COURT: Five minutes.

Do you have any rebuttal?

MR. SHERTLER: No, sir. Just for planning purposes, how does the Court want to handle this once we're done with the evidence?

THE COURT: I'll hear closing arguments, and I'll give you an oral opinion, and that will be the end of the case.

MR. SHERTLER: An oral opinion today?

THE COURT: Oh, absolutely.

MR. SHERTLER: Okay. Would you mind if we took ten minutes then just to get our thought together?

THE COURT: Yeah, sure. Go ahead.

(A brief recess was taken.

(After recess.)

THE COURT: Do you have anything else Mr. Martin?

MR. MARTIN: No, sir, but Mr. Wrobel has two things.

MR. WROBEL: The defense just wants to move into evidence Exhibit 75, which is excerpts from Mr. Lyon's deposition.

THE COURT: Yes, right. I've been handed those.

MR. SHERTLER: No objection, Your Honor.

THE COURT: All right. Anything else?

MR. MARTIN: Defense rests, Your Honor.

THE COURT: All right. Anything else?

MR. SHERLTER: No, Your Honor.

THE COURT: All right, I'll hear your argument on this.

MR. SHERTLER: Thank you, Your Honor.
Your Honor, I'll try to be brief in the argument. And I tried to frame it out and according to the issues.

THE COURT: Yeah, I don't need to hear much from you at this juncture. I will hear more from you when Mr. Martin is done. I understand what your case is. It's as simple as it can be in terms of constructive trust. I want to hear from you about dissolution first. You're arguing dissolution under 2-413. Are you pressing that?

MR. SHERTLER: Yes, Your Honor.

THE COURT: What is there to dissolve?

MR. SHERTLER: There's nothing except - -

THE COURT: So why bother? I mean it's a long standing principle of equity, that equity will not compel a useless act. Why bother? Why go through the appointment of a receiver and - - just let the corporation die. It has no assets, does it?

MR. SHERTLER: I don't think we have any objection to just letting the corporation die.

THE COURT: All right. Well, as to I.C.E., what about that one?

MR. SHERTLER: I don't see any difference between I.C.E. and - -

THE COURT: I don't see any either.

All right. It's voluntarily dismissed, the Count under 2-413 then. And let's just move on directly. I am trying to strip out what is important here.

MR. SHERTLER: I'll only take about five or ten minutes.

THE COURT: Go right ahead. What count is that in the Amended Complaint, by the way.

MR. SCHERTLER: 3, Your Honor.

THE COURT: Voluntarily dismissed on Count 3, Rule 41. Go ahead.

MR. SCHERTLER: Judge, the history between Mr. Lyon and Mr. Campbell is as bloody, bitter and complicated as one can imagine. And you've had first hand experience with that.

THE COURT: Well, it ain't pretty - -

MR. SCHERTLER: It ain't pretty - -

THE COURT: - - on either side here. But, you know, what I've got to decide is to narrow it down to what is relevant to this particular lawsuit.

MR. SCHERTLER: I agree. And what you've got here that complicates the issue, and I agree that this is on both sides, a history of doing business without following proper corporate form, without following the proper documentation and memorialization, that might make this case a whole lot easier.

But I submit that maybe both men are guilty of that. Both men may be guilty in terms of the feud that they had been engaged in the last 20 years. But, the fact of the matter is, it doesn't have anything to do with this one final piece of business that existed between Jack Lyon and Larry Campbell, and that was this property Oxen Cove.

THE COURT: It might not be as final as you think if the 4th circuit sends the other thing back.

MR. SCHERTLER: Well, that's true.

THE COURT: Okay, go ahead.

MR. SCHERTLER: We are holding our breath on that.

But there is this one piece of business, that the men have stopped doing everything else. They are not doing any business together. They don't own any other assets than Oxen Cove, and thy own that property 50-50.

And what should happen in this case is that once they sold that last piece of business, that last asset that they held together, the money should have gone to each other for the benefit of 50-50.

THE COURT: Well, here's the thing. And here is what I , what I would ask of you. The theory seems to be, as best as I can isolate it, the theory seems to be that in order to free the Oxen Cove property, which was an asset of the corporation owned, in theory, 50-50 by Lyon-Campbell, from the restraints of the security interest held by Broyhill, so that the property could be sold, so that anybody could receive any money, Mr. Campbell, on behalf of the corporation, was obligated to see to it that Broyhill got two-and-a-half million dollars.

Although, his happened like years before the sale, but that's the theory, so I want to hear you address that.

MR. SCHERTLER: Do you know what, my answer to that, judge, is simple. Broyhill was his friend; Antonelli was his friend. He paid Antonelli half. And they said, hey, we're buddies. I don't the need notes, Nick. When I pay you my half, you don't have to give me the notes, because you're my buddy, I trust you.

Broyhill was his buddy. When he paid Broyhill the half, and I am not sure that we dispute that he paid Broyhill the half at some point. Broyhill, he said, you've got the notes and you don't have to hand them over to me.

THE COURT: All right.

MR. SCHERTLER: Both men - - the way this all originally worked, they got these loans from the bank on behalf of EC. Both men were principal guarantors to that loan. Both men had responsibility for it. Both men - -

THE COURT: It did incumber corporate assets.

MR. SCHERTLER: It did incumber corporate assets. There's no question about it. But, when Antonelli bailed them out by buying these notes, both men - - and I know the Court has focused on Exhibit 73. And while I am not going to stand here and try to be an expert on novation, because I'm not, the Court knows more about that than I do.

What happened here is that both men said to Antonelli, thanks for bailing us out. And what we are going to do is whatever you pay, just what you p ay, not the face value, but what you pay, plus some interest that you would be due on that money, we're going to pay you half and half.

And I would submit, and I know there is a challenge to the evidence on the defense part as to this respect as to whether Mr. Lyon made those payments, but I would submit that the evidence is equal on both sides. That both en paid their half to Antonelli and that discharged any obligations of anybody with respect to those notes. That was the end of it. It should have been the end of it, whether in law or equity.

For Mr. Campbell to come back six years later, six years after he claimed Broyhill, after he claimed he paid Broyhill, and now claim that the corporation, of which he is a director and an officer, owed him that money, I think that is where there is a problem here. It's classic self-dealing. It's a classic conflict of interest. There is no way in the world that I could have walked into that L.C. board and said - -

THE COURT: Well, you say conflict of interest, I'm going to take that - - I mean, not that Mr. Lyon might have done some things in the corporate field that conflicted with other people's interest as well.

MR. SCHERTLER: Judge, I mean I - -

THE COURT: There is egg on both faces here.

MR. SCHERTLER: There is - - there he is. And there is a history that goes back. And I guess what I don't believe is relevant, and what I don't' think we can resolve here, is who is right and who is wrong in that history.

I think that when you focus on what happened here, Mr. Lyon is right. He should have gotten his half share.

And what you've heard from Mr. Campbell - - and I don't mean anything negative to Mr. Campbell to this - - but what you've heard happened here is that Mr. Campbell has bitter feelings about all the disputes that have gone on between him and Jack Lyon over the last 15 or 20 years. And when he got this money he felt in his - -

THE COURT: He probably wasn't real happy that he won in Prince George's County trial court only to have it thrown out on appeal, is he?

MR. SCHERTLER: That's - - you know, that's right. And that's, you know, the vagaries of litigating. And, as you say, these two men have done a lot of it.

But, the bottom line is, you can't say in this kind of situation where you do have a trustee's obligation because you are in charge of the corporation.

I mean if we applied the rules of how our businesses are supposed to work to this particular case, Mr. Lyon should have gotten half and Mr. Campbell should have gotten half. It was wrong, in this case, for Mr. Campbell to come in and say, I am unhappy with Jack Lyon because I think that the guy has cheated me out of so much the past ten years that I am going to take his money because I feel in my heart, in my mind, I am justified to it.

I don't doubt that in his heart and in his mind he believes that; but he is wrong under the rules of business as we are supposed to conduct them. And I would ask, respectfully, for this Court to start imposing those business rules in the dealings between these two men.

He should have honored his duty, as a trustee, to Mr. Lyon. He should have taken half that money. One million we agreed was paid for Mr. Lyon's benefit. But he should have taken the other half and said, Jack, this is yours. I am going to take half of that proceeds for me because I'm a 50 percent shareholder; you're a 50 percent shareholder, so you are going to get it too.

For Mr. Campbell to walk into that Board six years later and say, L.C. owes me the money, violates that trust that he had under the Court's theory that was articulated last Friday of a constructive trust.

There is no way a third-party could have done that. The corporation - - if I walked in there, the corporation would have jumped up and gotten their lawyers all around us and said, wait a minute, the statute of limitations has expired on this note. There has never been a corporate reaffirmation of this note. There is no way you are going to collect, Mr. Schertler. You are not going to get this four million dollars.

He was calling the shots. There is no dispute about that. Mr. Campbell called the shots. He went in and he said, the corporation owes me money and they went along with it.

THE COURT: All right, Mr. Schertler, I don't think I need to hear anymore from you at this point.

MR. SCHERTLER: Can I just say one more thing?

THE COURT: Yeah, go ahead.

MR. SCHERTLER: If we look at the way the business is supposed to be conducted under the laws of Maryland, under the Uniform Commercial Code, as we move toward here, a holder in due course has to hold the notes. He didn't hold the notes. He had never seen them. He had never acquired them. We don't know where they are. There is no notation or evidence that he ever got them. Mr. Campbell admits that he never saw them. Without those notes he couldn't go to the corporation and say - -

THE COURT: What happened in this case the way business is supposed to be done is like comparing the Led Zepelin to Mozart.

MR. SCHERTLER: I don't disagree with you on that.

And as I toiled with this case over the last year-and-a-half I've seen that. I guess, what I'm asking now is let's start putting on the rules, because I think they do apply.

THE COURT: All right. I understand. Thank you very much. I might ask to hear more from you after I've heard from Mr. Martin. But I want to hear from Mr. Martin first.

MR. SCHERTLER: Thank you, Your Honor.

THE COURT: Thank you.

MR. MARTIN: Your Honor, if I have learned anything over the years, it does little good to beat around the bush. You go right to the point. And the issue is - -

THE COURT: We have very few bushes in here. It is more of a forest.

MR. MARTIN: We all know that Your Honor.

THE COURT: Right.

MR. MARTIN: The issue is, I think, in this case is: Did Mr. Campbell pay the money? They said, did Mr. Lyon pay the money? They admit - -

THE COURT: Well, it is a question of what money. You know, the money, sort of bleeds over between the whole debt, the half debt, the debt of L.C., the debt of Mr. Campbell, the debt of Mr. Lyon. So I would like you to be more specific when you talk about it.

MR. MARTIN: Suppose that what Mr. Campbell did was only pay his half for Exhibit 73.

THE COURT: Right.

MR. MARTIN: He only paid his half.

THE COURT: Right.

MR. MARTIN: And Mr. Lyon didn't pay any. If Mr. Campbell paid his half - -

THE COURT: Right.

MR. MARTIN: - - he was able, through paying his half, to get Mr. Antonelli to release to Mr. Broyhill the security in his property.

THE COURT: Right.

MR. MARTIN: If that is the case, and he was able to keep his property form being taken by Mr. Antonelli, and the letter, although, it doesn't say it directly, Your Honor, there was that last exhibit that came in, the letter to Mr. Campbell from Mr. Antonelli.

THE COURT: I have read that.

MR. MARTIN: In all of that, Your Honor, there is, you know, I've carried you guys all these years. I am ten million dollars out. It is written in September, beginning of October 1989. I am ten million dollars out.

Well, the only way he got ten million dollars out is if nobody has paid that debt.

THE COURT: What about Mr. Campbell's deposition testimony, which I read over the lunch hour, where he says that he considered that he doesn't know and doesn't care, frankly, what Lyon did? I am paraphrasing, what Lyon did in terms of paying off half of it. But, he says, I had moral obligation to pay Mr. Antonelli half. A moral obligation as a personal, you know, I knew I wouldn't be responsible for no more than half, he says.

MR. MARTIN: Yes, Your Honor. He knew he wouldn't be.

THE COURT: I can't speak for Mr. Lyon.

MR. MARTIN: And Mr. Lyon testified here, Your Honor, that he had a moral obligation to pay. The issue becomes, if one paid the other - -

THE COURT: What evidence is there that - - what evidence is there at all that Lyon did not pay? Mr. Campbell says he doesn't know. And Mr. Lyon says he did. And Mr. Antonelli says he did. Therefore, what evidence is there, other than just the plain disbelieving Lyon and Antonelli who are the two interested parties in this, because we don't have a Broyhill, what evidence is there that Lyon never satisfied his half?

MR. MARTIN: Well, Your Honor, for starters, you address what Mr. Campbell said was, I don't know what Mr. Lyon did.

THE COURT: Right.

MR. MARTIN: You heard Mr. Campbell testify, he was answering the question saying it to him, all right, he didn't know what Mr. Lyon did. I think what he is saying is, that he doesn't believe Mr. Lyon paid. It is just sort of a way of answering the question.

THE COURT: What he said in his deposition is, he only paid Antonelli, he said, I gave him $200,000.00 more than he was entitled to. But it was, you know, did you pay him anything more than the half? Now considering the amount of money he is talking about here, it's half.

MR. MARTIN: Right.

Let's assume - - I mean we can - - the evidence in this case is that he paid half.

THE COURT: Right.

MR. MARTIN: And you want to know what the evidence is that Mr. Lyon didn't pay?

THE COURT: Yes.

MR. MARTIN: Let me start, Your Honor.

THE COURT: Okay.

MR. MARTIN: We have a comparison of some of the exhibits, Your Honor. I will put this up there for you. I thought we would never get to use anything.

THE COURT: .Well, you've got it, I would like to hear it. Let me see it.

MR. MARTIN: Your Honor, what we have here is Defendant's 61, Mr. Lyon's financial statement as of 6-30-86. He says, the debt - - that's the same debt, he admits - -

THE COURT: Well, the financial statements in this case are somewhere in between Grimms Fairy Tales and Through the Mirror or Through the Looking Glass by Louis Carroll.

MR. MARTIN: I admit that, Your Honor.

THE COURT: They are complete cockamamie nonsense.

MR. MARTIN: They are prepared by the same accountant for Mr. Antonelli and Mr. Lyon.

THE COURT: I understand that. And they are probably to defraud the government, but that's another problem for another day.

MR. MARTIN: Which is an issue about credibility - -

THE COURT: We will let that decision be for the government.

MR. MARTIN: Now, Your Honor, I mean I am not telling you anything you don't know then based on what you've said, but the letter they put in from the same accountant - -

THE COURT: Right.

MR. MARTIN: - - says that as of 12-31-86, he only owed $180,000.00 of those debts. But then you have the - -

THE COURT: And he keeps on scheduling them at $7,000,000.00. I understand that.

MR. MARTIN: He schedules them at seven million and he signs under oath the Offer in Compromise.

THE COURT: I understand that.

MR. MARTIN: And, I think, Your Honor, that it is a fair evaluation of that is that Mr. Lyon didn't tell you the truth here in the courtroom.

When I got to the seven million on 1989, all of a sudden it became a different $7,000,000.00 debt. It wasn't the same one that had been in the Offer in Compromise that he couldn't deny; instead, now, it's a difference seven million. In addition, Your Honor - -

THE COURT: I hear you.

MR. MARTIN: In addition, that document, Plaintiff's Exhibit 99, that says that the debt is paid down to 180,000, in that document there is an evaluation of the National Savings and Trust - -

THE COURT: But there is no indication that Broyhill ever - - and Broyhill was the equitable owner of the entire debt.

MR. MARTIN: That's right.

THE COURT: And there is no evidence that Broyhill ever went after Lyon, is there?

MR. MARTIN: No, Your Honor, he didn't.

One of the reasons he didn't go after Lyon, I would think, Your Honor, would be first the evidence in this case is that he was friends with Mr. Campbell.

THE COURT: Right.

MR. MARTIN: And second, in 1986 - -

THE COURT: Why would that keep him from going after Lyon? That would make him go after Lyon with a vengeance.

MR. MARTIN: Because in 1996, Your Honor, they had to sell the property.

THE COURT: Right.

MR. MARTIN: And in order to sell the property he had to release the debt.

THE COURT: Well, if Campbell - - if that loan had not been liquidated, why wouldn't Broyhill go after Lyon and say, hey, you know, you own two million bucks?

MR. MARTIN: Because Mr. Broyhill was also an acquaintance of Mr. Lyon, Your Honor. Don't forget, these people all knew each other. He may not have been a personal friend of Mr. Lyon, but they all knew each other.

And, Your Honor, in order to sell the property in 1996, that had to be released. Nobody's going to buy that property unless Mr. Broyhill released that. And so in 1986 - -

THE COURT: Yet, we have no papers showing the assignment from Antonelli to Broyhill.

MR. MARTIN: We only have that one document that assigns - -

THE COURT: One little mortgage on one part of the property.

MR. MARTIN: I wouldn't call it a little mortgage, but it is a mortgage.

THE COURT: Well, a mortgage.

MR. MARTIN: I mean, if it was my mortgage, I wouldn't call it little.

THE COURT: One of the many debtors.

MR. MARTIN: Yes, Your Honor.

THE COURT: I mean, one of the many secured parties.

MR. MARTIN: But, Mr. Antonelli testified that he gave him all the security.

THE COURT: Right.

MR. MARTIN: That was his testimony.

And, you remember he said, I should have marked the notes paid, but I didn't. But, he gave him all the security for it. And the assignment to him appears to be all the security. At the end of what we have is Mr. Broyhill saying he was paid.

So, I suggest, Your Honor, that the evidence in this case is that Mr. Lyon didn't pay his half. And if Mr. Lyon didn't pay his half, the believable evidence in this case, then I don't think a constructive trust ought to be imposed because Mr. Campbell - - it is almost undisputed Mr. Campbell paid his half. I mean, he came as close to - -

THE COURT: Suppose he didn't pay his half, and Campbell paid his half, the net result was that Campbell paid half of the debt and got the property released, why shouldn't Lyon get half?

MR. MARTIN: If Lyon didn't pay half of the debt, why should they pay him when he didn't pay for half of the debt? If he didn't lay it out of his pocket, and Mr. Campbell did, why should L.C. pay Lyon? That's, I think, the issue. And as L.C. - -

The directors at the time they made this decision, Your Honor, in 1986, in 1996 - - I keep, I'm decades off all the time - - the directors, when they made this decision, had in their minds, especially, Mr. Lyon and Mr. Campbell, all the litigation, you know, for whatever it's worth, they had that in their minds.

At the same time, Your Honor, they had in their minds what Mr. Lyon had done with this very property. When he came in and tried to lowball them, because he had a secret deal with Mr. Patz, where he was giving him a million dollars. Saddled that responsibility on Mr. Campbell. And what Mr. Campbell and Storke had in their minds, at that time, was, again, the prior history that the Patz debt doesn't have - -

THE COURT: That doesn't have any net consequence because that all nets out. The million dollars is going be, was credited to Lyon, and Mr. Campbell is not out of pocket anything.

MR. MARTIN: That's not true, Your Honor. As a legal matter he might not be, but as an equitable matter, he might be.

THE COURT: What is he out of pocket equitably, if not legally?

MR. MARTIN: The reason that Mr. Lyon had to pay Mr. Patz was because he took money from an I.C.E. company, 1.8 million dollars.

THE COURT: Wasn't that back in 1980?

MR. MARTIN: Right. And I realize, Your Honor, it has been very hard to get a grasp on this case because of all of that. But the reason that he had to pay Mr. Patz was because of the million seven that Mr. Lyon took years earlier.

THE COURT: But the million dollars that he paid, even if there were constructive trust, would not come out of his pocket. It comes out of Lyon's share.

MR. MARTIN: No, Your Honor. But the million - - it's like if I take a million seven from you - -

THE COURT: Yeah.

MR. MARTIN: And then I take another million from you to pay off a debt. I take a million seven from you which causes me to have a liability to somebody. That somebody sues me, and then I take another million from you to pay off that liability.

THE COURT: When did that happen?

MR. MARTIN: He took a million seven from E.C.

THE COURT: Right.

MR. MARTIN: Patz sued him for it.

THE COURT: Right.

MR. MARTIN: The million seven went into his pocket.

THE COURT: Right.

MR. MARTIN: And he walked away with a million seven.

THE COURT: Right.

MR. MARTIN: Patz sued him for it. Them he took another million from L.C. to pay Patz off. So it's 2.7 million dollars in his pocket that Mr. Campbell doesn't have.

THE COURT: But the million dollars, if the property is worth 4 million, let's say, and you split that 50-50 so that each party gets 2 million, you knock a million off for the money that was paid off to Patz.

MR. MARTIN: But first you have to give some credit - -

THE COURT: Go back to the 1.7 million?

MR. MARTIN: - - to Mr. Campbell for the 1.7.

THE COURT: Well, that may well be, but that's all in the past, Excavation Contractors was in bankruptcy.

MR. MARTIN: We're talking Patz - -

THE COURT: At that point, Mr. Campbell had no interest, legal or equitable, in E.C. because it was thrown into bankruptcy. And Patz represented, as the bankruptcy trustee, he is now the E.C. entity. And as far as Campbell is concerned, he gets no beneficial, nor does Lyon get anything beneficial out of it.

MR. MARTIN: That's the point. Lyon got the money to start with. And then it goes back into E.C. where neither one of them gets it.

THE COURT: It goes to the creditors who deserve to stand in front of both of these guys. This Court's going to go - - I guess that where the money - -

MR. MARTIN: When the money was taken - -

THE COURT: Where did the million bucks go? It went to the creditors, didn't it, of E.C.?

MR. MARTIN: Most of it went to Mr. Patz probably, Your Honor. I think in the practical matter.

THE COURT: It probably did. It's under the universal rule of bankruptcy, the big buzzard gets fed first.

But, the point is, that in theory at least, there were a lot of people who stand ahead of either Lyon or Campbell, or both of them in the E.C. bankruptcy. And that the money that was stolen by Mr. Lyon, if he stole it, of the 1.8 million was stolen from more from the creditors than from Campbell. That's why the money wouldn't trickle down to Campbell. It's going to go to pay the creditors.

MR. MARTIN: That's right, Your Honor. But, at the time the money was taken, the company wasn't in bankruptcy.

THE COURT: Well, that is when Methuselah was a young man.

MR. MARTIN: I might have even been a young man then, Your Honor.

At the time the money was taken, Your Honor, it wasn't. Mr. Campbell had a claim to that money. And that was money that would have been available to - -

THE COURT: He, he didn't really have a claim to it, the corporation did.

MR. MARTIN: Well, it's the same claim Mr. Lyon has to this money.

THE COURT: I understand.

MR. MARTIN: I mean, if that - - that didn't really - - you know, nobody knows what would have happened if the million seven had been in E.C. Maybe they never would have been in bankruptcy, who knows?

And I understand the legalities of all this, Your Honor. What I'm trying to put in your mind is what was in Campbell's mind at the time.

THE COURT: I know. I am considering this from an equitable standpoint.

MR. MARTIN: I think, Your Honor, that in considering it from an equitable standpoint, you have to consider what was in the minds of these people at the time. Even the history, whether there is a legal claim to it or not, there may be some equitable claim. Because, I mean, I don't profess to have a great understanding of constructive trusts. You know, the first time - - as you know the first time I thought of constructive trust was when you said it last Friday afternoon.

But it seems to me that Mr. Lyon has to have a good equitable claim. And I think it comes down to whether he paid the debt. And then there has got to be circumstances considering all the equities, it would render it inequitable for Mr. Campbell to retain those funds. I don't think that kind of evidence - -

THE COURT: How do you meet the argument that as of September of 1984, whatever the debt might be between Antonelli and Lyon, it was sort of res inter alios because of the splitting out and severing of the liabilities of Lyon and Campbell by the instrument, which is Exhibit 73 here?

MR. MARTIN: Because, Your Honor, the debt and the original agreement with Mr. Antonelli. All that, all of that 1984 document does is put in writing what the original agreement was with them; that I am going to buy these notes, and you guys are going to have to pay me back. You pay me half and you pay me half.

THE COURT: But why does it - - why would it be then simply a bilateral agreement, or a bilateral document between Antonelli and Campbell, rather than involve all three of them if it were simply a confirmatory deed of some sort?

MR. MARTIN: Because at the time, Your Honor - -

THE COURT: And Antonelli was - -

MR MARTIN: - - the gentlemen were fighting with each other at that time. And Mr. Campbell wanted to be sure that his responsibilities to Mr. Antonelli was separate from Mr. Lyon's.

THE COURT: Well, he accomplished that.

MR. MARTIN: He accomplished that. But it's still a corporate debt, Your Honor. It doesn't matter that the liability to pay it off is split out. It is still a corporate debt because the security that Mr. Antonelli was holding was the L.C. property. So it remained a corporate debt. It always was. You heard Mr. Cook testify, it always was corporate debt that these gentlemen had guaranteed - -

THE COURT: Is there any evidence in the record that either Antonelli or Broyhill ever pressed Mr. Campbell for payment?

MR. MARTIN: I think you can read the September 29th letter. And I think Mr. Campbell indicated in his - -

THE COURT: September 29 of what year?

MR. MARTIN: The 1989 letter where Mr. Antonelli was telling Mr. Campbell that he was through. He couldn't keep carrying these guys any longer. He was 10 million dollars into them. He doesn't say he's going to - - he doesn't threaten, specifically, Your Honor.

THE COURT: No. No, he doesn't.

MR. MARTIN: But I think you can read that letter showing that there is a lot of pressure being put - - it's number 74, Your Honor.

THE COURT: It is written to Mr. Campbell.

MR. MARTIN: Yes, sir.

THE COURT: Right, I've got it here. September of '89.

MR. MARTIN: Yes, sir. And he says he's 10 million dollars invested in this thing. He goes through all the reasons why they should be able to sell this quarry. And he is going to go get a third party. And Mr. Campbell - -

THE COURT: This is before the Millville deal closed.

MR. MARTIN: It is after the one fell that fell through.

THE COURT: Right.

MR. MARTIN: And before the second one. This is when Mr. Campbell said he took up Mr. Antonelli's invitation to go try to negotiate a deal with Everett. It doesn't specifically threaten anybody, Your Honor.

But, I think you can read into there that Mr. Antonelli is getting ready to - - he's going to go sell it to someone else.

THE COURT: Well, there is nothing that says here, is it, that he's pressuring Lyon to pay his part of it?

MR. MARTIN: I am not prepared to continue this and will attempt to find a purchaser for my position. Part of his position was that these monies that Mr. Campbell owed him. That was part of his position as set out earlier in the letter.

The 1, 2, 3, 4, the fifth paragraph down, I have asked various banks to acquire liens of notes. This is what we've called in this case, Your Honor, the I.C.E. obligation.

And, Your Honor, the letter written in October of 1989 by Mr. Blankstein, who was Mr. Lyon's lawyer, and Mr. Antonelli's lawyer, said that Mr. Lyon didn't pay the debt.

When that letter says, the obligations owed to Mr. Antonelli, that, you know, he'll collect his separately. He writes a letter in October all connected with this Millville deal. That was a letter to Mr. Wilson who was the lawyer, apparently, who was negotiating on behalf of Millville.

Mr. Blankstein, who was Mr. Lyon's in-house lawyer, and Mr. Antonelli's in-house lawyer, writes that letter in which he says that the debt isn't paid made yet. And we have this whole series of whatever they are - - you know, they are - - if it's the I.R.S. - -

THE COURT: If you didn't have access to bank records and what, you could have come in with some kind of evidence that Mr. Broyhill was paid. But, we don't have that evidence in terms of cancelled checks - -

MR. MARTIN: No, Your Honor.

THE COURT: - - or any notes.

MR. MARTIN: All we have is Mr. Broyhill's statement in those two exhibits that the debts had been paid. I understand Mr. Schertler's argument, but it

THE COURT: That's right. But, why should that bear any more weight since he's a buddy of your client than Antonelli's coming in here, you're claiming I shouldn't believe Antonelli when he says the debt was paid by Lyon? Where is there any corroborating evidence on either side?

MR. MARTIN: Mr. Campbell's corroborating evidence is that Mr. Broyhill released the debt. He said it is paid.

THE COURT: Well, I know that. And Mr. Antonelli's corroborating evidence is, I guess, he hasn't sued Lyon, and he didn't foreclose on him.

MR. MARTIN: Antonelli's corroborating evidence -- What is his corroborating evidence? His own lawyer writes a letter during the time Mr. Antonelli had said it's paid, and says it isn't paid.

These financial statements, Mr. Antonelli's bankruptcy petition in that Section 5 where he - - even though this was Mr. Lyon's money, he said it was transmitted right to Mr. Lyon. He reported that the interest that Mr. Campbell paid him on, is his own money. So that two million dollars that he sent to Mr. Lyon was the kickback from Millville Quarry. That's what that was.

That wasn't the - - you know, Mr. Lyon, Your Honor, I cross-examined Mr. Lyon about his deposition in 198 - - 1993.

THE COURT: I don't believe for a minute that he paid Campbell's half. I think that's just a lie. But move on.

MR. MARTIN: But if that's the case, Your Honor, I don't know why you would credit the story that he paid the other half when all the documents say, all the documents say that, his own documents prepared by his accountant say he didn't pay. Except for this one document that says it's down to 180 when his - -

THE COURT: Even if they didn't pay it, what difference does it make?

MR. MARTIN: If he didn't pay it - -

THE COURT: Because the evidence shows clearly that whatever Broyhill got was what Antonelli gave him after September of '84 when the debts had been split from a joint and several obligation to a several obligation assumed by Mr. Campbell in that instrument, which is all that Broyhill got.

MR. MARTIN: And he held the security. He held the security. He held the ability to foreclose on that property. Mr. Antonelli had that until he gave it to Mr. Broyhill. He gave it to Mr. Broyhill because Mr. Campbell paid.

THE COURT: But there is no indication whatever that Broyhill ever threatened to hold up the sale, that Broyhill ever threatened to foreclose, that Broyhill ever asserted a claim that was more than half of the principal claim of the Antonelli debt.

MR. MARTIN: But what difference does that make when the corporation, L.C., knows that it was, in essence, saved from foreclosure by what Mr. Campbell did? They don't have any evidence that Mr. Lyon did anything to save them from foreclosure. So they say, we are going to pay the debt of Mr. Campbell.
We're going to pay back Mr. Campbell because he kept Mr. Antonelli from foreclosing on his property. That's what he did. He got - - he secured that mortgage so that no one could foreclose on the property. He did that through his friend Mr. Broyhill.

THE COURT: What he did was, he got Broyhill to pay half, half of the Antonelli debt. That's what he said in his own deposition. That's all he ever paid.

MR. MARTIN: But he got all the security. But he got all the security for it.

THE COURT: Well, that's nice. But, why - - you know - -

MR. MARTIN: If Mr. Lyon didn't pay, why does he deserve - - the corporation says - -

THE COURT: What it means is then that Broyhill was stupid by only taking half of what he could have gotten.

MR. MARTIN: Well, there is more than one stupid person along the line in this thing when you're talking about corporate niceties. Like you said, they treated these corporations like they were Lego blocks.

But, Your Honor, if the corporation knows that one of the principals has paid a debt which enabled them then to go forward and sell this property in 1996, and the other one hasn't paid, why can't the corporation reimburse that one for what he paid?

THE COURT: One little problem here is that there is no paper trail whatever showing any loan, et cetera, or obligation assumed, or debt, or, you know, anything from the Board of Directors authorizing him to incur the debts, blah, blah, blah. I mean, there is just nothing.

MR. MARTIN: There is Mr. Cook's testimony that they discussed it.

THE COURT: Well, yeah, I know.

MR. MARTIN: They understood the history. And having understood the history and having seen that Mr. Antonelli was releasing the debt, they said Mr. Campbell should be paid.

THE COURT: Other than an oral history, there is nothing.

MR. MARTIN: Look, Your Honor, I agree with that.

I, also, agree that there is, as you said, there's - - first of all, Mr. Lyon comes into this courtroom and I believe lied to you about his paying Campbell's half, for starters. I think that's what you believe.

I don't know how that kind of conduct can be rewarded in the context of this case. This is an equity case. The evidence in this case is, there is no dispute that Mr. Campbell paid his half. I think there is highly disputed evidence whether Mr. Lyon actually paid his half, despite what Mr. Antonelli said.

You've got all of Mr. Antonelli's bankruptcy petition where he took the money into income. You have him saying he took all of the money Campbell gave him and shipped it right back to Mr. Lyon. When, in fact, he didn't. It was a far lesser amount, four hundred thousand less.

You have all these equities, all these things that are going on here, Your Honor, that are almost undisputed in front you. There is no doubt in your mind, I am willing to bet, that all of those financial statements are false, prepared by the same accountant. And it is also Mr. Antonelli's accountant.

When Mr. Lyon's got a problem with the I.R.S., he comes in here and he does all this. But when Mr. Antonelli's got a bankruptcy problem, all of a sudden he owes Mr. Lyon a million and a half dollars. He's got proof of claim. And that debt supposedly goes back to 1986.

Given all of that, Your Honor, I don't think you can believe what they've been telling you. And if you can't believe what they have been telling you, I don't know how you could, in good conscience, award a constructive trust in this matter.

It just doesn't seem fair to me when practically all the equities that you've heard in this case are on Mr. Campbell's side. He may not have followed the corporate niceties. He might not have done any of that, but there is proof that he paid that debt.

There's proof that he paid it. And he procured its release. Nobody has disputed that. And there is absolutely no believable proof that Mr. Lyon paid anything. And I don't think under those circumstances, Your Honor, you know, Mr. Antonelli said that Mr. Lyon paid off the debt.

So if he said that, how can you believe whatever else he said? If you don't believe Jack Lyon paid all the debt, how can you believe what Mr. Antonelli said about anything? It just seems to me that when that kind of evidence is presented to the Court, that the Court ought to find in good conscience you can't impose any kind of constructive trust here.

It also has seemed to me, Your Honor, from the beginning that I know the niceties of this are that there are two corporations. And who knows, you know, we've already got - - the dissolution count has already been voluntarily dismissed.

But the entity that has the right to the money is I.C.E. And that is an argument that is long dead. And I am sorry I raised it just now, Your Honor. It just came into my head. Sometimes I say what comes into my head and don't think about it.

But, Your Honor, I just can't emphasize enough, I don't think you can believe anything Mr. Lyon told you because of what he did here on the stand. He changed his story. In 1993 he had his deposition taken. And I want to show you, he was shown his '86 financial statement, his '87, his Offer in Compromise in '88, his '89. And he was asked if he was carrying this debt and he said, yes.

And then he was shown his 1990 where the debt suddenly disappeared. And he was asked, well, you know, how did you pay that debt? He said, I paid it from the proceeds of the Millville Quarry. That's what he said.

Well, that was a lie then if what he said here was true. In fact, Your Honor, Mr. Antonelli didn't say that. Mr. Lyon hasn't said that. And I don't think that there is any credible evidence here on which you can reasonably justify imposing a constructive trust here. And I would hope that at some point Your Honor comes to agree with me.

Thank you, Your Honor.

THE COURT: All right. Thank you very much. Go ahead.

MR. SCHERTLER: Your Honor, may I respond to this quickly.

THE COURT: Go ahead.

MR. SCHERTLER: First of all, I respectfully ask and I submit that a lot of the things that Mr. Martin is raising in his closing argument are not evidence in this case. He is dredging up things that have happened in past litigation that the Court has no knowledge of from witnesses here.

But I do want to emphasize one thing to the Court: There is no more evidence that Larry Campbell ever paid Joel Broyhill - - we know that Broyhill paid Antonelli at the closing of the Millville quarry. There is no more evidence that Larry Campbell ever paid Joel Broyhill for those Antonelli notes than there is that Mr. Lyon ever paid Mr. Antonelli for those notes.

THE COURT: Yes, but there is not circumstantial evidence that he didn't. This is circumstantial evidence that your client never paid. How you do you explain all this?

MR. SCHERTLER: Your Honor, Mr. Lyon explained that these financial statements were done using the face value of the notes. And unless the debt was discharged in full, Mr. Antonelli could have always acted on the face value of the notes. And that's what these financial statements reflected.

And I could see an accountant looking at it and saying, well, you know, if the notes aren't completely discharged, you are still liable for the face amount of the value.

And if you look at the numbers, they correspond to the face amount of the value of those notes. They do not correspond to the amount of money that Mr. Antonelli was going to require of either Mr. Campbell or of Mr. Lyon to discharge that debt.

You have Mr. Lyon's testimony that he paid Mr. Antonelli. You have Mr. Antonelli's testimony that Mr. Lyon paid him.

Now look, Mr. Coburn and I are good friends, but you can be sure that if he owes me two million dollars, I am going to make sure I get paid for it. I am just not going to forgive him for that.

And when you look at the relationship between all these men, friends or not, the fact of the matter is that they didn't follow corporate niceties all of the time, but there was some sense of, I owe this person that amount of money and I am going to pay them.

And we've got a contemporaneous document, Plaintiff's Exhibit Number 99, that shows that - - that's written in 1989 that shows an accounting of the amount that Mr. Antonelli paid for each of the different notes and the amount - -

THE COURT: And you don't have check number one. You don't have receipt number one. You don't have note number one. All you've got is the testimony of Lyon and Antonelli who have been bosom buddies since 1936.

Everything was all paid. Millions and millions of dollars, he volunteered to pay on b half of Campbell. And I took all that. I was just really a nice guy. And it was taken care of.

And in which case, sir, if, in fact, everything was paid, why didn't Antonelli just discharge the debt rather than assigning it to Broyhill?

MR. SCHERTLER: Mr. Antonelli said he was wrong in not discharging the debt. That when he gave Broyhill those notes, what he should have said is paid and discharged. He said that on the witness stand.

And, Your Honor, I do want to take strong exception - -

THE COURT: Mr. Antonelli is not stupid. He's a wise man. Now whether he is telling the truth or not is another thing that I have to figure out. Arguably, he is not. But, in any event, he is not stupid enough to hand over a loaded gun of debt to Mr. Broyhill to shoot Mr. Lyon with, who's his buddy. This is stupid. It goes beyond lacks; it's incredible.

MR. SCHERTLER: It is. Look, they all did stupid things, Mr. Antonelli, Mr. Broyhill, Mr. Campbell, and Mr. Lyon. And I take exception to Mr. Martin's statements that Mr. Lyon lied on the stand. I disagree with that strongly.

But what I do, and without going in and addressing that in detail, what I would like to tell the Court is that the state of the evidence is in equipoise. You don't have anymore on one side than you have on the other side. You have no check from Larry Campbell that he paid Joel Broyhill. You have no check from Jack Lyon that he paid Mr. Antonelli.

THE COURT: Well, that's true. But, in the case where the evidence is in equipoise then the decision goes in terms of who has the burden of proof.

MR. SCHERTLER: And I submit - -

THE COURT: You have the burden of proof because you're claiming the trust.

MR. SCHERTLER: I submit that if we look at the law, that the burden of proof changes when you have a person in a, with a fiduciary relationship, as a trustee, who is engaged in getting this corporation - - that they have two conflicting duties; one is his personal interest in getting these notes, the alleged notes, there are no notes, getting these notes paid; and, he's also got a duty at the same time as a director of this corporation.

When there is evidence of self-dealing like that, the law requires that the director show that the transaction was fair under the circumstances.

And I submit than when the evidence is in equipoise in this case, the burden falls upon the defendant to show, because of Mr. Campbell's situation, and Mr. Storke, and Mr. Cook, that the transaction was fair. It's a classic case of someone having conflicting interest, a director having conflicting interest.

THE COURT: Well, you're right about the shifting burden under Wimmer versus Wimmer.

MR. SCHERTLER: Judge, I would also say that, all I am saying to you about the evidence in equipoise is that the evidence about the payments to Mr. Antonelli is in equipoise. And if that is in equipoise, then what we are left with in this case is the sale of a property that each man owned 50-50. And, in which, each man should have gotten 50 percent of the proceeds.

And I think that's where the Court has got to come down on this case. There is no rational basis in law and equity upon which the Court can say that Mr. Campbell was justified in taking more than one-half of the net proceeds here. I just cannot see it.

And we cannot go back and litigate all the different disputes and claims of cheating and stealing because Mr. Campbell had a chance to get up there and vent to the Court. Mr. Lyon didn't. And I can tell you that if you gave Mr. Lyon a couple of hours, he could tell you any number of a hundred ways in which he feels he was cheated by Mr. Campbell.

We are not here to resolve those disputes. You couldn't possibly do it if you wanted to. We're here looking at one transaction, the last business deal between these two men after everything had gone by the wayside.

And if we look at that according to the law, and according to the way businesses should be run, and the duties of fiduciary and trust that directors have to a corporation, then the net proceeds should have gone to each man 50-50.

And I submit that that's what should happen in this case, and I would ask the Court to do that.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MARYLAND

JOHN W. LYON,

Plaintiff

vs.

LARRY A. CAMPBELL, ET AL.,

Defendants

Civil No. S-98-1129

Baltimore, Maryland
April 23, 2001

BEFORE: His Honor, Frederic N. Smalkin.

APPEARANCES

For the plaintiff:

David Shertler
Barry Coburn

For the defendants:

Gerard P. Martin
Thomas Zagami
Steven Wrobel

* * *

from 1943 to 1946. And I had a Naval Commission. I was recalled to active duty in Korea in 1951 to 1953.

Q. Let me try to focus you a little bit, when did you first meet Larry Campbell?
A. I first Met Larry Campbell in, I believe, 1966.

Q. Do you see Mr. Campbell in courtroom here today?
A. Yes, he's here, sitting at the desk.
MR. SHERTLER: Your Honor, may the record reflect the identification.

THE COURT: It is not a criminal trial, but that's all right, go ahead.

Q. At some point, did you and Mr. Campbell incorporate a company called ICE, Inc.?
A. We did. We did that I believe in 1971.

Q. And who were the owners of ICE, Inc.?
A. The owners of ICE, Larry and I were equal owners of ICE.

Q. And it remained at that time from 1971 when you first incorporated ICE, Inc., until the present time, is that how the ownership remained?
A. That's correct. There has never been any other owners.

Q. What was the purpose of incorporating ICE, Inc.?
A. It was a broad purpose, but primarily it was done as a company to hold a number of subsidiaries that we had.

Q. And did in subsequent years, ICE actually owned other subsidiaries?
A. It actually owned other subsidiaries, yes.

Q. How many?
A. I would assume that we had as many as 30 companies at one time that we were equal owners in. And they were all under the umbrella of ICE.

Q. You have the Plaintiff's Exhibit book in front of you, correct?
A. Yes, sir.

Q. What would I like to you do is start with Plaintiff's Exhibit Number 1, take a look at that, please?
A. I have it.

Q. Do you recognize it?
A. I believe so, it's been a long time.

Q. What is the title of it?
A. The title is Articles of Incorporation of I-C-E, Inc.

Q. Would you please go to the second to last page of that exhibit?
A. (Witness complying).

Q. Does it state the date on which these Articles of Incorporation were executed?
A. 12th day of May 1971.

Q. Are you familiar with LC, Inc.?
A. Yes, I am.

Q. When, if you recall, was LC, Inc., incorporated?
A. I believe, it was incorporated the same year.

Q. 1971?
A. Yes.

Q. Before or after ICE?
A. I believe after ICE.

Q. And who owned LC, Inc.?
A. LC, Inc., was owned by ICE.

Q. A hundred percent owned by ICE?
A. A hundred percent.

Q. What was the purpose of incorporating LC?
A. LC was a company that had a broad authority to operate it. But, primarily we were looking at it as a real estate holding company.

Q. Is it fair to say that that's a company through which you would buy real estate and hold on to it?
A. Yes.

Q. What was the idea, that you would sell it for a profit, or did you have some other purpose for the real estate?
A. It would be real estate we were concerned with in our business. Primarily it was construction.

Q. Would you take a look the Plaintiff's Exhibit Number 2?
A. (Witness complying.)

Q. Take your time, if you would like to get yourself a cup of water that's okay?
A. I have it.

Q. Do you recognize it?
A. I have seen it before, yes.

Q. What does the first page, the Certificate of Incorporation, does it have a date on it?
A. It was filed June the 21st, 1971.

Q. Can I take you to Exhibit 3, please? And would you take a look at that and tell me if you recognize it?
A. It's an annual meeting of stockholders.

Q. If you look at the top, I know it's not the clearest copy, but can you see what it is entitled?
A. The top of mine is blurred. I assume it says, By Laws. But there is only part of the word laws showing.

Q. It says of LC, Inc., correct?
A. Yes.

MR. SHERTLER: Again, Your Honor, I am assuming everything is admitted.

THE COURT: Yes, sir. If I don't hear an objection, it is.

Q. Did there come a time when LC purchased a parcel of land called Oxen Cove?
A. There did.

Q. Could you briefly describe to the Court what this parcel of land was and where is was located>
A. Parcel of land located in two jurisdictions, the Prince George's County and the District of Columbia. And it comprised roughly 83 acres. And it was on the Potomac River front.

Q. Who decided to buy Oxen Cove?
A. I believe Larry decided, made that decision.

Q. Did you discuss that decision with Larry?
A. I'm sorry?

Q. Did you discuss the decision to buy Oxen Cove with Larry?
A. I'm sure we discussed it, because I settled the property.

Q. Do you know when the property was purchased by LC?
A. Yes.

Q. When?
A. When? In 1972, I believe.

Q. Do you have an approximate amount that you paid for the property when LC first purchased if?
A. About half a million dollars.

Q. And was LC the only owner of this property?
A. LC was the only owner, yes.

Q. At the time LC purchased it, LC was owned by ICE; is that correct?
A. That is correct.

Q. And ICE was owned 50 percent by you and 50 percent by Mr. Campbell?
A. That's correct.

* * *

THE WITNESS: I did.

THE COURT: But, then you just said that Mr. Campbell paid his share when you got the settlement from Millville. To whom did he make that payment? I'm not clear on that.

THE WITNESS: Your Honor, Mr. Antonelli did not tell Mr. Campbell that I had paid the note.

THE COURT: Oh.

THE WITNESS: He wanted to collect when Larry had the money to pay, because he had promised to pay his half.

THE COURT: So Mr. Antonelli was going to get paid twice? You had already paid him.

THE WITNESS: Well, when Mr. Campbell paid Mr. Antonelli the amount of money he owed - -

THE COURT: Right.

THE WITNESS: - - he, in turn, refunded the money to me, the half that I had paid for Mr. Campbell.

THE COURT: Oh, okay. We hadn't quite gotten there yet. But, if you say that's what happened, I understand that to be your testimony.

Go ahead.

MR. SHERTLER: Judge, I think you asked the questions that I was going to ask.

Q. At that point in time, was it your understanding that

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

JOHN W. LYON,	*
Plaintiff	*
v.	*
LARRY A. CAMPBELL, et al.,	*
Defendants	*

* * * * * * * * *

Case No. S-98-1129

DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT IN LIGHT OF COURT'S RULING ON APRIL 18, 2001, OR IN THE ALTERNATIVE, MOTION FOR BENCH TRIAL ON COUNT III

Defendants, Larry Campbell, Edward Storke, and Robert Cook, through counsel, and in light of the Court's ruling on April 18, 2001 that "plaintiff's case will proceed only on direct actions by him in his capacity as a shareholder against the directors of the corporation" submit their second Motion for Summary Judgment as to all counts and state:

1. Count I of Plaintiff's First Amended Complain for breach of fiduciary duty can only be brought as a derivative action on behalf of the corporation and therefore, judgment must be entered in favor of defendants;

2. Count II, a statutory court, only provides for a corporation to proceed under this statute, and thus, judgment must be entered in favor of the Defendants; and

3. Court III requires that a plaintiff be a stockholder "entitled to vote" in order to allege any illegal, oppressive or fraudulent conduct, and as Plaintiff had clearly pledged away all of his voting rights during the period of the alleged conduct, Plaintiff has no standing to bring this action, and therefore, judgment must be entered in favor of Defendants.

4. Alternatively, should the Court order judgment in favor of the Defendants on Counts I and II only, then the Defendants submit that since the long remaining Count (III) is one in equity for dissolution, then the case must be tried before the Court without a jury.

Defendants rely on the legal arguments set forth in their Memorandum in Support attached hereto.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of April, 2001, copies of Defendants' Second Motion for Summary Judgment and Memorandum in Support thereof were forwarded via facsimile and first class mail, postage prepaid to:

Barry Coburn, Esquire
David Schertler, Esquire
Coburn & Schertler
727 15th Street, N.W.
Suite 800
Washington, D.C. 20005

/s/ Steven F. Wrobel
Steven F. Wrobel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

JOHN W. LYON, *

Plaintiff *

v. *

LARRY A. CAMPBELL, et al., *

Defendants *

* * * * * * * * * *

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR SECOND MOTION FOR SUMMARY JUDGMENT IN LIGHT OF COURT'S RULING ON APRIL 18, 2001, OR IN THE ALTERNATIVE, MOTION FOR BENCH TRIAL ON COUNT III

Defendants, Larry Campbell, Edward Storke, and Robert Cook, submit the following Memorandum in Support of their Second Motion for Summary Judgment, or, in the Alternative, Motion for Bench Trial on Count III, and state:

Previously, this court has opined that "[t]o the extent that the Plaintiff complains of individual injury from alleged breaches of fiduciary duty by the directors of the corporation, he might well have no standing to do so under the holding of the Court of Appeals of Maryland in Waller v. Waller, 187 Md. 185 (1946)." (Lyon v. Campbell, Civ. No. S-98-1129, mem. and order at 4-5 (D. Md. Oct 1, 1999). Despite the Court's strong hints to the Plaintiff to properly file a derivative action in this matter, Plaintiff never formally did so, instead, he insisted in his pleadings that his

direct claims were also somehow derivative in nature as well. On April 18, 2001, this Court ended all speculation that the Plaintiff had properly brought derivative claims by correctly ruling that the Plaintiff's complaint was not verified as required by Fed. R. Civ. P. 23.1 and that Plaintiff's case would proceed only on direct actions by him in his capacity as a shareholder against the directors. Unfortunately for Plaintiff, now that his derivative claims are not viable, any direct action fails under Maryland case law and statute.

I. THERE IS NO DIRECT ACTION AVAILABLE FOR BREACH OF FIDUCIARY DUTY BY A DIRECTOR OF A CORPORATION:

The Maryland Court of Appeals established Maryland's fundamental test in deciding whether a stockholder has standing to sue individually. Waller, 187 Md. at 194. In that case, the plaintiff claimed that the defendant had made decisions regarding the corporation which had the effect of diminishing the value of stock and forced the corporation into bankruptcy proceedings, apparently in an effort to ruin the plaintiff financially and take control of the corporation in which they jointly held controlling stock. Id.. at 188. In deciding the issue of whether the plaintiff, an individual stockholder, was the correct party in interest, the court found that, in a suit against a director for acts that resulted *in a diminution in value of stock* of the corporation, a stockholder may only sue derivatively as a right of action belonging to the corporation, not the individual stockholder. Id. at 189.

Here, there is no dispute that the Plaintiff's allegation against Defendants is that they unlawfully distributed to Mr. Campbell alone proceeds of the sale of L-C. Inc.'s ("L-C") only asset, despite Mr. Lyon's allegation that he was entitled to one-half of the proceeds through his

50% ownership interest in L-C's parent I.C.E., Inc. ("I.C.E."), the sole shareholder of L-C, Inc. In essence, Mr. Lyon alleges that Campbell, Storke and Cook, as directors of L-C, breached their fiduciary duty to him (Lyon) by failing to pay him his share of the sale proceeds based on his 50% stock interest in I.C.E. Prior to the Court's clarification on April 18, 2001, counsel for Plaintiff attempted to explain the exact nature of his direct action as follows:

> The corporation had no remaining purpose other than to wind up its affairs and distribute its assets to the shareholders. Thus it is not principle theory that any corporate purpose or interest was frustrated by distributing Mr. Lyon's share of the sale proceeds to Mr. Campbell. Rather, by doing so, defendants violated their fiduciary duty to Mr. Lyon personally. His injury is obviously distinct from any injury to the other stockholder, Mr. Campbell, since Mr. Campbell was enriched by the injury to Mr. Lyon. Accordingly Mr. Lyon has a private right of action against the defendants. (See, Plaintiff's Opposition to Defendants' Motion for Summary Judgment at p. 12, filed August 16, 1999).

Interestingly, the above passage put forth by Plaintiff's counsel is completely devoid of any legal authority, or reference to the record extract. Under this theory, the injury, if any, is one to the corporation, I.C.E., for a diminution of value of the assets of the corporation, and collaterally to Lyon, a diminution of the value of his stock in I.C.E., the corporate owner of L-C.

However, the Maryland Court of Appeals stated in Waller that:

> It is a general rule that an action at law to recover damages for an injury to a corporation can be brought only in the name of the corporation itself acting through its directors, and not by an individual stockholder though the injury may incidentally result in diminishing or destroying the value of the stock. The reason for this rule is that the cause of action for injury to the property of a corporation or for impairment or destruction of its business is in the corporation, and such an injury, although it may diminish the value of the capital stock, is not primarily or necessarily a damage to the stockholder, and hence the stockholder's derivative right can be asserted only through the corporation.... Generally, therefore, a stockholder cannot maintain an action at law against an officer or director of the corporation to recover damages for fraud, embezzlement, or other breach of trust which depreciated the capital stock or rendered it valueless. Where directors commit a breach of trust, they are liable to the corporation, not to its creditors or stockholders, and any damages recovered are assets of the corporation, and the equities of the creditors and stockholders are sought and obtained through the medium of the corporate entity. Id at 189-190.

The only exception to this rule occurs when the directors commit "acts which are violations of a duty arising from contract or otherwise and owing directly from the officer to the injured stockholder." Id. at 192. Here, Plaintiff cannot point to any such "duty arising from contract or otherwise" in this case; indeed, there is none.

The Fourth Circuit has recognized the applicability of the Waller case and adopted the same rationale in Armstrong v. Frostie Co., 453 F.2d 914 (4th Cir. 1971) (holding where a cause of action arises from actions of the directors or officers of the company, the correct plaintiff to that action is the corporation) and Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel, 20 F.3d 1311 (4th Cir. 1994) (holding the advantage to corporate status is that stockholders are shielded from direct liability for acts of the corporation, thus is stockholders choose this type of protection through the purchase of stock, and the value of the stock diminishes, it is "well settled law" that a stockholder will not have standing if the wrong or injury is to the corporation and the result is a diminution in the value of the stock).

This concept is only further borne out by the statute upon which Plaintiff relies for his second cause of action, MD. CODE ANN., CORPS. & ASS'NS § 2-504.1, the Standard of Care required of directors. § 2-405.1(g) specifically codifies the rule of Waller v. Waller, as follows:

> (g) *Limitation on enforceability.* - **Nothing in this section creates a duty of any director of a corporation enforceable otherwise than by the corporation or in the right of the corporation.**

In light of the fact that Plaintiff is only proceeding in a direct action capacity, judgment should be entered for Defendants on Counts I and II as a matter of law.

II. PLAINTIFF, WHO HAD PLEDGED HIS VOTING RIGHTS DURING THE PERIOD OF ALLEGED WRONG-DOING, HAS NO STANDING UNDER § 3 3-413 TO PURSUE DISSOLUTION.

In Count III, Plaintiff seeks dissolution of I.C.E. and L-C on the basis that the acts of the directors "are illegal, oppressive or fraudulent." MD. CODE ANN., CORPS. & ASS'NS § 3-413(b)(2). In order to have standing to bring Court III, however, Plaintiff must be a "stockholder with voting power." While there is no dispute that Plaintiff currently, and as of February 1998, was again a "stockholder with voting power," there is also no dispute that none of the complaints made by plaintiff are based on conduct that post-dates February of 1998. In fact, all of the conduct that Plaintiff describes as being "illegal, oppressive or fraudulent" is conduct that occurred **while plaintiff has absolutely no voting power** in the corporations, based on his pledge of stock to the Bankruptcy Trustee.

There is also no dispute that Mr. Lyon entered into his agreement with the bankruptcy trustee – at the latest – on April 12, 1995, the date the trustee's fraud case against Plaintiff was set to begin. Further, there is no dispute that the Trustee did not return the stock to Plaintiff until February, 1998. During that nearly three-year period between these two dates, the directors of the corporation sold the Oxen Cove property and distributed the proceeds of that sale.

The pledge agreement between Plaintiff and the Bankruptcy Trustees clearly outlined the powers conveyed by Plaintiff to the Trustee:

3. Voting Rights. Whether or not an Event of Default has occurred under this Agreement, the Trustee may exercise all voting rights at any meeting of the shareholders or other members of the issuer of any of the Collateral.

Additional, ¶ 8 of the Agreements states:

8. Rights of the Pledgor [Lyon] in the Collateral. The Pledgor shall not have any right to modify, amend or waive any terms or conditions of the Collateral, or any rights or interests therein, without the Trustee's prior written consent, which consent shall not be unreasonably withheld or delayed.

(Pledge Agreement at p. 4, attached hereto as Exhibit A).

Clearly, Plaintiff should only be able to bring a count for dissolution based upon conduct that occurred while he was a voting shareholder. Such a rationale is in line with the reasoning of the contemporaneous ownership rule in other stockholder suits. Here though, the inquiry is even more limited. All the Court needs to determine is that Plaintiff was not a "stockholder with voting power" at the times of the wrongs alleged. Plaintiff's arguments about any residual rights he may have maintained during the pledge period are simply irrelevant based on the specific standing requirement of § 3-413, i.e. **"stockholder with voting power"** and the express language of ¶ 3 of the Pledge Agreement.

Maryland law has adopted the contemporaneous ownership rule. In Eisler v. Eastern States Corp., 182 Md. 329, 35 A.2d 118 (1943), the court found that a shareholder, in order to maintain suit, must have had stock at the "time of the transaction complained of." Eisler., 182 Md. at 335. The Maryland Court of Appeals, following Matthews v. Headley Chocolate Co., held that "...the appellant does not have the standing to complain of acts and management of the corporation prior to the time he became a shareholder thereof." Id. at 335.

Most recently, in Ettridge v. TSI Group, Inc., 314 Md. 32, 548 A 2d 813 (1988), the Maryland Court of Appeals found that a stockholder who received title to the stock subsequent to alleged misconduct could not sue for breach of fiduciary duty. Ettridge, 314 Md. at 41. In that case, the minority stockholder attempted to sue Ettridge, the majority stockholder, for breach of fiduciary duty in mismanaging and misappropriating funds. Id. at 38-38. The court determined, however, that the minority stockholder gained title to the stock from an individual who acquiesced to the mismanagement and acquired title after the mismanagement occurred, therefore, barring his claim. Id. at 43.

As to Count III, Maryland law recognizes that only a voting shareholder can seek the extreme remedy of dissolution based on alleged bad acts of the directors. It is axiomatic that the alleged wrongs of the directors correspond to the time period in which the complaining shareholder held voting rights. One principle consideration supporting this rule, as the court noted in Ettridge v. TSI Group, 314 Md. at 41, is that to permit such an action would result in a windfall to the subsequent stockholder and would allow the stockholder to reap a profit from the wrongs done to others.

A similar situation exists in this case. Lyon certainly and unequivocally bargained away his voting rights in the stock of I.C.E., and thus, his right to complain, in order to settle a potential multi-million dollar fraud claim against him personally in ad adversarial proceeding in the Bankruptcy Court. Mr. Lyon then re-acquired his interest in February, 1998, long after the proceeds of the sale had been distributed, including a distribution of $1.0 million to the Bankruptcy Trustee pursuant to the Trustee's settlement with Lyon, and pursuant to the Trustee's - as a pledgee of Lyon's stock - settlement with Campbell and the other Directors. The Trustee possessed the right to vote as shareholder during the time period alleged and did not bring an action in dissolution. He had the right to complain of alleged mismanagement during that timeframe and yet did not. He had the right to settle or compromise claims arising under the collateral (Lyon's I.C.E. stock) and he did! Plaintiff is bound by those decisions and cannot now complain.

Finally, should the Court determine that only Counts I and II should be dismissed at this time, and allow Count III to proceed, the Defendants request that this count be tried by the District Court without a jury. Section 3-413 clearly notes that a stockholder entitled to bring suit for dissolution "may petition a court of equity" to do so. As such, there will be no issues remaining for a jury to consider, and the case should proceed on this count before the Court alone.

III. CONCLUSION

In light of the Court's ruling of April 18, 2001, summary judgment in favor of Defendants is appropriate at this time, and Defendants request judgment in their favor be issued.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT.
FOR THE DISTRICT OF MARYLAND

JOHN W. LYON 2700 Virginia Avenue, N.W. Washington, D.C. 20037 Plaintiff,	)	
v.	)	Case No. S987-1129
LARRY A. CAMPBELL 146 South Gomez Road Hobe Sound, Florida 33455,	)	
and	)	
EDWARD W. STORKE c/o Arnold M. Weiner, Esq. Snyder Weiner, Weltcheck, Vogelstein & Brown 829 Reisterstown Road, Suite 100 Baltimore, MD 21208	)	
and	)	
ROBERT B. COOK 1911 U.S. Highway 1 North Palm Beach, Florida 33408 Defendants.	)	

SECOND AMENDED COMPLAINT

Plaintiff John W. Lyon alleges the following against defendants Larry A. Campbell, Edward W. Storke and Robert B. Cook:

Parties and Jurisdiction

1. Plaintiff John W. Lyon is domiciled in the District of Columbia. He brings suit herein in his own name, and derivatively as a shareholder of LC Inc. and I.C.E., Inc., in the name of those corporations.

2. Defendant Larry A. Campbell is domiciled in. the State of Florida.

3. Defendant Edward W. Storke is domiciled in the State of Maryland..

4. Defendant Robert B. Cook is domiciled in the State of Florida.

5. Accordingly, since complete diversity of citizenship exists between the parties and the amount in controversy exceeds $50,000, subject matter jurisdiction exists in this Court. Personal jurisdiction exists over each defendant, and venue is appropriate in this District, because the land at issue is in this District and because certain of the acts and, omissions complained of herein -occurred in this District.

Factual Background

L-C Inc.'s Purchase of Oxen Hill Manor

6. In 1971, Larry A. Campbell "Campbell") and John W. Lyon ("Lyon") formed I.C.E., Inc. ("ICE"), a holding company. ICE was and is equally owned by Campbell and Lyon. Its board of directors is comprised of Campbell, Lyon, and Edward W. Storke ("Storke").

7. LC Inc. ("LC") was incorporated by Campbell and Lyon. LC is wholly owned by ICE. From 1974 until 1995, LC's Board of Directors was initially comprised of Campbell, Lyon and Storke.

8. By deed dated September 30, 1974 and recorded October 3, 1974, LC became the record owner in fee simple of a parcel of land consisting of approximately 80 acres, located principally in Prince George's County and partly in the District of Columbia, commonly known as Oxon Cove Manor ("Oxon Cove"). LC purchased Oxon Cove in 1974 for $495,000[1].

9. LC purchased Oxon Cove for the purpose of using it as a landfill for excavation materials. However, LC was never able to obtain a permit to use the property as a landfill. Consequently, for almost 20 years subsequent to the acquisition of Oxon Cove, LC, through the efforts of Lyon and Campbell individually, tried to sell the property, but had no success in doing so.

Negotiations With Corrections Company of America

10. In January 1995, Lyon, acting on behalf of LC, was contacted by Joseph Johnson ("Johnson" of The Corrections Corporation of America "CCA"). Johnson told Lyon that CCA was interested in purchasing Oxon Cove. CCA believed it could use the property to build a correctional facility.

11. In early January 1995, CCA forwarded to Lyon an Option/Earnest Money Contract (the "Contract") for consideration by LC Inc. Lyon forwarded a copy of the contract to Campbell immediately after receiving it for their consideration as directors of LC.

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[1] Oxon Cove has also been referred to as: (1) the Oxon Cove property; (2) the Blue Plains property; and (3) the Fox Ferry Road property.

12. In response, on January 9, 1995, Campbell informed Lyon that he did not want to consider CCA's offer to purchase Oxon Cove. On January 12, 1595, Campbell reiterated to Lyon his position that they should not negotiate for the sale of Oxon Cove..

13. On January 18, 1995, Lyon requested a special meeting of the directors of LC and ICE to consider CCA's offer to purchase Oxon Cove. Lyon informed Campbell and Storke of his belief that "[t]o not follow through with such an exploration at this early stage would, in my view, be a mistake in much as there has been little interest shown in this parcel over the years. To turn our backs on this rare expression of interest would seem contrary to our fiduciary obligations as directors of L-C, Inc. and I.C.E., Inc." This letter generated no response from either Campbell or Storke and the meeting proposed by Lyon never occurred.

14. On February 8, 1995, Campbell informed Lyon that he expected Lyon to handle all discussions with Johnson concerning the sale of Oxon Cove. Campbell stated that Johnson should submit a proposal to Lyon and if Lyon found it acceptable, then Campbell and Storke would review the proposal.

15. On February 13, 1995, CCA proposed to purchase a six-month option on the property so that it could seek approval of its proposed use of the land as a correctional facility. If approval was not forthcoming within those six month, then CCA proposed to purchase an additional 90-day option to purchase the land. The 90-day option was to contain a clause which would allow LC to close the option and move to a settlement upon 10-days notice. CCA offered LC Inc. a purchase price of $2.5 million for the land.

16. On February 15, 1995, Lyon notified Campbell that CCA had submitted an acceptable proposal concerning the purchase of Oxon Cove. Lyon forwarded to Campbell a copy of CCA's revised proposed Contract for the purchase of the land and requested Campbell's comments or concurrence on the acceptability of the Contract.

17. On February 28, 1995, Campbell advised Lyon that the terms of the Contract were unacceptable to him. Despite the fact that the property had been on the market for approximately 20. years, Campbell insisted that the asking price be between $6.5 and 7 million and that a large deposit be required. Additionally, Campbell maintained that he would not find a contract to be acceptable if it contained any contingencies other than that for clear title.

18. On March 6, 1995, Campbell instructed Lyon to continue negotiating with CCA for sale of -Oxon Cove.

19. On March 21, 1995, Lyon forwarded to Campbell a new version of the contract along with a $10,000 check from CCA to Campbell. Lyon requested an immediate meeting of the LC and ICE Directors to consider CCA's offer. Campbell did not respond to Lyon's request.

20. On April 10, 1991 Johnson expressed CCA's disappointment that LC. had not responded to CCA's proposal to purchase Oxon Cove and requested a resolution as soon as possible. Johnson stated, *inter alia*, that "LC Inc.'s unwillingness to make a counteroffer or suggest other options considering the fact that the property has been sitting unused for twenty years indicates to us that there may be factors outside of our control which are affecting a decision on our proposal. if there are internal problems or business interferences with respect to this property which cannot be resolved in order to pursue this opportunity, please notify me and return our $10,000 check by April 17, 1995."

Campbell's Removal of Lyon From LC's Board of Directors

21. Pursuant to the LC by-laws, new directors are to be elected at the annual meeting of LC shareholders each June. Removal of an existing director is a separate and distinct action from electing a new director.

22. On May 5, 1995, Campbell, as Secretary of ICE, noticed a Special Meeting of the Board of Directors of ICE "to exercise its rights as shareholder of L-C, Inc. And to consider whether to *elect* new directors of L-C, Inc."

21 On May 15, 1995, a Special Meeting of the Board of Directors of ICE was held at which meeting Campbell and Storke, acting as a majority of the Board of Directors, removed Lyon as a director of LC. Campbell and Storke voted to replace Lyon with defendant Robert B. Cook. On information and belief, Mr. Cook was a lawyer located in Palm Beach Florida with no prior connection to LC, its holdings or its activities.

Sale of Oxen Cove

21. On June 21, 1995, pursuant to a Special Meeting of the new LC Board of Directors, a counteroffer was made to CCA. LC offered to sell Oxon Cove for $4 million. Included in this counteroffer was a contingency mirroring that which Campbell earlier had insisted was unacceptable. Specifically, CCA was given the option of making a $90,000 non-refundable deposit at the inception of the Contract in exchange for a six-month period in which they could conduct due diligence and obtain the necessary approvals for development of the property. Upon expiration, this due diligence period could be extended for an additional six months for payment of an additional $90,000 deposit. CCA accepted this offer.

25. On December 29, 1995, CCA sought an extension of the Contract for 180 additional days. This extension was granted and LC received another $90,000 deposit.

26. On or about August 31, 1996, LC closed a deal in which Oxon Cove was sold the CCA for a total of S4,000,000. The total of $180,000, which had already been paid to LC in the form of deposits, was considered part of that total price. After deducting this $180,000 and closing costs associated with the sale, LC realized a total of $3,726,249.57.

Campbell's Failure to Respond to Lyon's Inquiries Concerning the Sale

27. On July 12, 1996, Lyon, who remained a 50% shareholder of ICE and director of ICE, which in turn was the sole owner of LC, requested a status report on the sale of Oxon Cove. Lyon also requested information about the status of the $180,000 in payments which CCA had made to LC. Approximately one month later, on August 12, 1996, LC informed Lyon that the "Blue Plains Parcel" was being sold for approximately $4 million. Lyon continued to ask for information relating to the sale. He did so in separate letters dated September 3, 1996, October 4, 1996, February 14, 1997, June 11, 1997, June 17 1997, and December 16, 1997. He received no response.

28. Neither Campbell, Storke or Cook or any other representative of LC ever gave Lyon information relating to the sale, despite Lyon's repeated requests. Moreover, LC refused to provide Lyon with any information about the disbursements of money to other persons from LC of the proceeds of the sale.

The Distribution of the Proceeds of the Oxen Cover Sale

29. After the sale of Oxon Cove, defendant Campbell had complete control over the disbursement of the $4,000,000 that LC received from the sale. Of the $4,000,000 that LC realized from the sale of me Oxen Cove Property, $1,000,000 was paid to the bankruptcy trustee as Lyon had agreed and for Lyon's benefit. Approximately $100,000 was paid for settlement costs related to the sale. Another $45,000 was paid in taxes resulting from the sale. About $83,000 was paid as various "professional fees," primarily legal fees. ***Defendant Larry Campbell caused a total of $2,785,000 from the proceeds of the sale to be transferred to himself.***

30. Since Lyon and Campbell each owned 50% of LC through ICE, each should have been entitled to 50% of the net proceeds of the Oxon Cove sale. After reducing $4,000,000 sale price for taxes and expenses, almost $3,800,000 was left. Lyon and Campbell should have each received $1,875,000 from the proceeds. $1,000,000 was used to pay the bankruptcy trustee under the terms of Lyon's agreement, so Lyon was entitled to approximately $900,000, while Campbell should have received $1,900,000. Lyon never received any of this money. ***Instead Campbell caused LC to disperse all the net proceeds of the sale to himself.***

31. Campbell justified giving himself the entire amount of the net proceeds by claiming that L C owed him the money that lie had paid back to Antonelli in 1990 for one-half of what Campbell and Lyon owed to Antonelli.

The Antonelli Debt

32. In the late 1970s, Lyon and Campbell personally guaranteed a number of bank loans to one of their other corporations Excavation Construction, Inc. ("EC"). EC eventually went bankrupt and could not pay off these loans. Dominic F. Antonelli, a long-time friend and associate of Lyon, agreed to purchase the notes on these loans from the banks in order to save Lyon and Campbell from personal ruin. Lyon and Campbell had an understanding with Antonelli that they would pay him back his cost in buying the notes from the bank.

33. Between 1984 and 1990, Lyon paid back the entire amount owed to Antonelli. In 1990, Lyon paid Antonelli his one-half share of the amount to Antonelli and thereafter, Antonelli reimbursed Lyon for Campbell's one-half share that Lyon had already paid. As a result, by 1990, Antonelli had been paid off completely, one-half by Lyon and one-half by Campbell,. each paying from their personal funds.

The ICE and LC Tax Returns

34. Campbell hired certain individuals to analyze the ramifications of the sale and file ICE's final tax return. Lyon repeatedly requested information related to the filing of these returns. Lyon's repeated requests for information pertaining to that settlement were ignored.

COUNT ONE
(Breach of Fiduciary Duty)

35. Paragraphs 1 through 34 are hereby realleged.

36. By wrongfully failing to cause the tender to Lyon of Lyon's share of the proceeds of the sale of Oxon Hill Manor, by failing to wrap up remaining issues relating to that sale as detailed above, including but not limited to

resolution of the sale's tax consequences, and by failing to respond to Lyon's repeated requests for information, defendants have breached the fiduciary duty they owe to Lyon as a result of defendants' positions as officers and/or directors of L-C Inc. and/or ICE. Defendants' conduct in this regard has been extreme and outrageous. Moreover, Mr. Lyon alleges derivatively that by virtue of the same conduct, defendants lave breached the fiduciary duty they owe to L-C Inc. and ICE to manage their corporate affairs fairly, with care, and so as to avoid corporate liability to Mr. Lyon and the Internal Revenue Service.

COUNT TWO
(Violation of § 2-405. 1)

37. Paragraphs 1 through 36 are hereby realleged.

38. By virtue, of the conduct alleged above, defendants violated Maryland Corporations and Associations Article § 2-401.1, requiring that a director perform his duties in good faith, in the best interests of me corporation, and in accordance with. the applicable standard of care. As a result plaintiff was directly and proximately damaged.

COUNT THREE
(Violation of § 3-413 *el seq.*)

39. Paragraphs 1 through 38 are hereby realleged.

40. By virtue of le combat alleged above, defendants violated Maryland Corporations and Associations Article § 3-413, in that their conduct was "illegal, oppressive or fraudulent." Accordingly, involuntary dissolution of L-C, Inc and ICE and a distribution of corporate awes to the shareholders are hereby sought.

COUNT FOUR
(Right to Reimbursement
Md. Ann. Code Com. Law I §3-419 (1996))

41. Paragraphs 1 through 40 are hereby realleged.

42. As a one-half shareholder in ICE and therefore in LC, Lyon was entitled to reimbursement from LC for the amount of money be paid to Antonelli to satisfy LC's debt to Antonelli. Once LC realized the monies from the sale of Oxon Cove, LC was responsible for reimbursing Lyon for the amounts Lyon paid to Antonelli.

43. Lyon is therefore entitled to contribution from LC in the amount of approximately $2,500,000 plus interest.

COUNT FIVE
(Right to Contribution)

44. Paragraphs 1 through 43 are hereby realleged.

45. As one-half shareholder in ICE and therefore LC, Lyon was entitled to one-half half of the net proceeds realized by LC from the sale of the Oxon Cove property.

46. Campbell caused the net proceeds of the sale of the Oxon Cove property to be transferred to himself based on his claim that he had personally paid one-half of LC's debt to Antonelli.

47. Because Lyon had personally paid the other half of LC's debt to Antonelli, Lyon is entitled to a pro-rata (one half) contribution from Campbell of the net proceeds the Campbell had transferred to himself as reimbursement for paying off one-half of the debt.

48. Lyon is therefore entitled to contribution ham Campbell in the amount of one half of the net proceeds paid to Campbell or $1,400,000 plus interest

PRAYER FOR RELIEF

As a direct and proximate result of defendants' above described acts and omissions, Lyon has been damaged. Consequently, Lyon prays for an award of compensatory damages, pre- and post judgment interest, costs, expenses and attorneys' fees, punitive damages, and such other monetary relief as the Court may deem just under the circumstances. In addition, Lyon prays for injunctive relief in the nature of an order compelling an accounting of the above-described funds, as, well as an order compelling defendants to cause the distribution of the above-described funds to the shareholders of ICE.

JURY DEMAND

A trial by jury is hereby requested as to each and every allegation herein.

Respectfully submitted,

Coburn & Schertler

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IN THE UNITED STATES DISTRICT COURT.
FOR THE DISTRICT OF MARYLAND

JOHN W. LYON 2700 Virginia Avenue, N.W. Washington, D.C. 20037 Plaintiff,	)	
v.	)	Case No. S987-1129
LARRY A. CAMPBELL 146 South Gomez Road Hobe Sound, Florida 33455,	)	
and	)	
EDWARD W. STORKE c/o Arnold M. Weiner, Esq. Snyder Weiner, Weltcheck, Vogelstein & Brown 829 Reisterstown Road, Suite 100 Baltimore, Maryland 21208	)	
and	)	
ROBERT B. COOK 1911 U.S. Highway 1 North Palm Beach, Florida 33408	)	
Defendants.		

FIRST AMENDED COMPLAINT

Plaintiff John W. Lyon alleges the following against defendants Larry A. Campbell, Edward W. Storke and Robert B. Cook:

Parties and Jurisdiction

1. Plaintiff John W. Lyon is domiciled in the District of Columbia. He brings suit herein in his own name, and derivatively as a shareholder of L-C Inc. and I.C.E., Inc., in the name of Those corporations.

2. Defendant Larry A. Campbell is domiciled in the Stare of Florida.

3. Defendant Edward W. Storke's present domicile is not known with certainty, but he it not believed to reside in the District of Columbia.

4. Defendant Robert B. Cook is domiciled in the State of Florida.

5. Accordingly, since complete diversity of citizenship exists between the parties and the amount in controversy exceeds $50,000, subject matter jurisdiction exists in this Court. Personal jurisdiction exists over each defendant, and venue is appropriate in this District, because the land at issue is in this District and because certain of the acts and omissions complained of herein occurred in this District.

Factual Background

L-C Inc.'s Purchase of Oxen Hill Manor

6. In 1971, Larry A. Campbell ("Campbell") and John W Lyon ("Lyon") formed I.C.E., Inc. ("ICE"), a holding company. ICE was and is equally owned by Campbell and Lyon. Its board of directors is comprised of Campbell, Lyon, and Edward W. Storke ("Storke").

7. L-C Inc. subsequently was incorporated by Campbell and Lyon. It is wholly owned by ICE. The L-C Inc. Board of Directors initially was comprised of Campbell, Lyon and Storke.

8. By deed dated September 30, 1974 and recorded October 3, 1974, L-C Inc. became the record owner in fee simple of a parcel of land containing approximately 80 acres, located principally in Prince George's County and partly in the District of Columbia, commonly known as Oxon Hill Manor. L-C Inc.'s purchase price for Oxon Hill Manor was $495,000.. Oxon Hill Manor is alternately known as the following: (1) the Oxon Cove property; (2) the Blue Plains property; and (3) the Fox Ferry Road property.

9. L-C Inc. purchased Oxon Hill Manor for the purpose of operating it as a landfill for materials excavated from land development projects. However, L-C Inc. was unsuccessful in obtaining a permit for such use of the property. Consequently, for approximately 20 years subsequent to the acquisition of Oxon Hill Manor, L-C Inc. attempted unsuccessfully to find a purchaser for the property.

Negotiations With Corrections Company of America

10. In January 1995, Lyon, on behalf of L-C Inc., entered into negotiations with Joseph Johnson ("Johnson"), on behalf of the Corrections Corporation of America ("CCA:), for the sale of Oxon Hill Manor by L-C Inc. to CCA. CCA was interested in purchasing the property for use in the construction of a correctional facility to house federal prisoners and/or District of Columbia minimum security inmates.

11. At the time CCA entered into negotiations for the purchase of Oxon Hill Manor, CCA did not have a commitment from any governmental entity that such use of Oxon Hill Manor would be approved.

12. On January 1, 1995, CCA forwarded to Lyon an Option/Earnest Money Contract (the "Contract") for consideration by L-C Inc. Lyon forwarded a copy of the Contract to Campbell immediately after receiving it.

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14. On January 18, 1995, Lyon requested a special meeting of the boards of directors of L-C Inc. and ICE to consider CCA's interest in Oxon Hill Manor. Via letter, Lyon informed Campbell and Storke of his belief that "[t]o not fallow through with such an exploration at this early stage would, in my view, be a mistake inasmuch as there has been little interest shown in this parcel over the years. To turn our backs on this rare expression of interest would seem contrary to our fiduciary obligations as directors of L-C. Inc. and I.C.E., Inc." This letter generated no response from either Campbell. or Storke and the meeting proposed by Lyon never occurred.

15. Via letter dated February 8, 1995, Campbell informed Lyon that he expected Lyon to handle all discussions with Johnson concerning the sale of Oxon Hill Manor. Campbell stated that Johnson should submit a proposal to Lyon and if Lyon found it acceptable, then Campbell and Storke would review the proposal.

16. On February 13, 1995, CCA proposed to purchase a six-month option on the property so that it could seek approval of its proposed use of the land as a correctional facility. If approval was not forthcoming within those six months, then CCA proposed to purchase an additional 90-day option to purchase the land. The 90-day option was to contain a clause which would allow L-C Inc. to close the option and. move to a settlement upon 10 days notice. CCA offered L-C Inc. a purchase price of $2.5 million for the land.

17. On February 15, 1995, Lyon notified Campbell that CCA had submitted an acceptable proposal concerning the purchase of Oxon Hill Manor. Lyon forwarded to Campbell a copy of CCA's revised proposed Contract for the purchase of the land and requested—Campbell's comments or concurrence on the acceptability of the Contract.

18. On February 28, 1995, Campbell advised Lyon that the terms of the Contract were unacceptable to him. Despite the fact that the property had been on the market for approximately 20 years, Campbell insisted that the asking price be between $6.5 and 7 million and that a large deposit be required. Additionally, Campbell maintained that he would not find a contract to be acceptable if it contained any contingencies other than that for clear title.

19. On March 6. 1995, Campbell instructed Lyon to continue negotiating with CCA for sale of Oxon Hill Manor.

20. On March 21, 1995, Lyon forwarded to Campbell a new version of the Contract along with a $10,000 check from CCA to Campbell. Lyon requested an immediate meeting of the L-C Inc. and ICE Boards of Directors to consider CCA's offer. Campbell did not respond to Lyon's request.

21. On April 10, 1995, Johnson expressed CCA's disappointment that L-C Inc. had not responded to CCA's proposal to purchase Oxon Hill Manor and requested a resolution as soon as LC Inc.'s unwillingness to make a counteroffer or possible. Johnson stated, *inter alia*, that suggest other options considering the fact that the property has been sitting unused for twenty years indicates to us that there may be factors outside of our control which are affecting a decision on our proposal. If there are internal problems or business interferences with respect to this property which cannot be resolved in order to pursue this opportunity, please notify me and return our $ 10,000 check by April 17, 1995."

Campbell's Scheme to Remove Lyon From the L-C Board of Directors

22. Pursuant to the L-C Inc. by-laws, new directors are to be elected at the annual Meting of L C Inc. shareholders each Tune. Removal of an existing director is a separate and distinct action from electing a new director.

23 On May 5, 1995, Campbell, as Secretary of ICE, noticed a Special Meeting of the Board of Directors of ICE "to exercise its rights as shareholder of L-C, Inc. And to consider whether to *elect* new directors of L-C, Inc." (emphasis added).

24. On May 16, 1995, a Special Meeting of the Board of Directors of ICE was held at which meeting Campbell and Storke, acting as a majority of the Board of Directors, purported to remove Lyon as a director of L-C Inc. Concurrent with this removal, Campbell and Storke voted to replace Lyon with defendant Robert B. Cook. On information and belief, Mr. Cook was a lawyer located in Palm Beach, Florida with no prior connection to L-C Inc., holdings or its activities.

Sale of Oxon Hill Manor Pursuant to Earnest Money Contract

25. On June 21, 1995, pursuant to a Special Meeting of the new L-C. Inc. Board of Directors, a counteroffer was made to CCA. L-C Inc. offered to sell Oxon Hill Manor for $4 million. Included in this counteroffer was a contingency mirroring that which Campbell earlier had insisted was unacceptable. Specifically, CCA was given the option of making a $90,000 non-refundable deposit at the inception of the Contract in exchange for a six-month period in which they could conduct due diligence and obtain the necessary approvals for development of the property. Upon expiration, this due diligence period could be extended for an additional six months for payment of an additional $ 90,000 deposit. CCA accepted this offer.

26. On December 29, 1995, CC A sought an extension of the Contract for 180 additional days, as was contemplated by the Contract. CCA requested a response to this request from Campbell and Storke by January 12, 1996. As of January 19, 1996, neither Campbell nor Storke responded to this request even though extension of the Contract would have resulted in the immediate receipt of an additional $90,000 and would have enhanced the likelihood of the ultimate sale of Oxon Hill Manor for $4 million.

27. In 1995, CCA offered L-C Inc. S1.4 million to purchase Oxon Hill Manor. The new L-C Inc. Board of Directors voted unanimously to reject this offer and instead to proceed to settlement in accordance with the terms of the Contract. Settlement was scheduled for July 19, 1991. Upon information and belief, settlement occurred on August 30, 1996.

Campbell's Failure to Respond to Lyon's Inquiries Concerning the Sale

28. On July 12, 1996, Lyon requested a status report on the sale of Oxon Hill Manor Lyon additionally requested copies of correspondence exchanged between L-C Inc. and CCA and a copy of the feasibility study which had been provided to L-C Inc. by CCA. Lyon also requested confirmation of the status of the $ 180,000 in payments which CCA had, on information and belief made to date under the Contract. Lyon again requested information from L-C Inc. on July 16, 1996. Approximately one month later, on August 12., 1996, L-C Inc. informed Lyon that the "Blue Plains Parcel" was being sold for approximately $4 million. Lyon requested additional information from L-C Inc. on September 3, 1996, on October 4, 1996, on February 14, 1997, on June 11, 1997, on June 17 1997, and on December 16, 1997, but received no response.

29. L-C Inc. never forwarded to Lyon copies of documents relating to the sale, as he had repeatedly requested. Furthermore, L-C Inc. initially withheld information from Lyon concerning whether the sale of Oxon Hill Manor had been closed. L-C Inc. refused to provide Lyon with any details about payments which had been made to L-C Inc. pursuant to such sale or about vehicles in which those funds were being held invested. Finally, L-C Inc. refused to disclose any information about the timetable for distribution of the net proceeds of the sale to Lyon.

30. Lyon had been informed by Campbell and his representatives that the proceeds of the sale were to be sent to L-C Inc. in care of Mr. Campbell. Lyon was further informed that a distribution of proceeds would be made after the tax considerations were finalized and ICE's final tax return was filed.

31. Campbell hired certain individuals to analyze the tax ramifications of the sale and file ICE's final tax return. In particular, he retained a former Director of the Internal Revenue Service and a highly respected accounting firm. However, Campbell professed to be unhappy with their recommendations, and indicated that he intended to take the problem elsewhere for a different recommendation.

32. To date, Lyon's repeated requests for information pertaining to that settlement have been wholly ignored. Consequently, he does not know where the funds are, how they are invested, what the expenses have been, or whether a final tax return has been fled for ICE. On information and belief, a portion of these funds have been paid to the bankruptcy trustee in In re. Excavation Construction, Inc., Case No, 79-0153 5, pending in. this Court.

COUNT ONE

(Breach of Fiduciary Duty)

33. Paragraphs 1 through 32 are hereby realleged.

34. By wrongfully failing to cause the tender to Lyon of Lyon's share of the proceeds of the sale of Oxon Hill Manor by falling to wrap up remaining issues relating to that sale as detailed above, including but not limited to resolution of the sale's tax consequences, and by failing to respond to Lyon's repeated requests for information, defendants have breached the fiduciary duty they owe to Lyon as a result of defendants' positions as officers and/or directors of L-C Inc. and/or ICE Defendants' conduct in this regard has been extreme and outrageous. Moreover, Lyon alleges derivatively that, by virtue of the same conduct, defendants have breached the fiduciary duty they owe to L-C Inc. and ICE to manage their corporate affairs fairly, with care, and so as to avoid corporate liability to Mr. Lyon and the Internal Revenue Service.

COUNT TWO
(Violation of § 2-405.1)

35. Paragraphs 1 through 32 are hereby realleged.

36. By virtue of the conduct alleged above defendants violated Maryland Corporations and Associations Article 2-405. 1, requiring that a director perform his duties in good faith, in the best interests of the corporation, and in accordance with the applicable standard of care. As a result, plaintiff was directly and proximately damaged.

COUNT THREE
(Violation of § 3413, *et seq.*)

37. Paragraphs 1 through 32 are hereby realleged.

38. By virtue of the conduct alleged above, defendants violated Maryland Corporations and Associations Article § 3-413, in that their conduct was "illegal, oppressive or fraudulent." Accordingly, involuntary dissolution of L-C, Inc. and ICE and a distribution of corporate assets to the shareholders are hereby sought.

PRAYER FOR RELIEF

39. As a direct and proximate result of defendants' above described acts and omissions, Lyon has been damaged. Consequently, Lyon prays for award of compensatory damages, pre- and post-judgment interest, costs, expenses and attorneys' fees, punitive damages, and such other monetary relief as the Court may deem just under the circumstances. In addition, Lyon prays for injunctive relief in the nature of an order compelling an accounting of the above-described funds, as well as an order compelling defendants to cause the distribution of the above-described funds to the shareholders of ICE.

JURY DEMAND

A trial by jury is hereby requested as to each and every allegation herein.

Respectfully submitted,
Coburn & Schertler

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Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT.
FOR THE DISTRICT OF MARYLAND

JOHN W. LYON 2700 Virginia Avenue, N.W. Washington, D.C. 20037 Plaintiff,	)	
v.	)	Case No. S987-1129
LARRY A. CAMPBELL 146 South Gomez Road Hobe Sound, Florida 33455,	)	
and	)	
EDWARD W. STORKE c/o Arnold M. Weiner, Esq. Snyder Weiner, Weltcheck, Vogelstein & Brown 829 Reisterstown Road, Suite 100 Baltimore, MD 21208	)	
and	)	
ROBERT B. COOK 1911 U.S. Highway 1 North Palm Beach, Florida 33408 Defendants.	)	

COMPLAINT

Plaintiff John W. Lyon alleges the following against defendants Larry A. Campbell, Edward W. Storke and Robert B. Cook:

Parties and Jurisdiction

1. Plaintiff John W. Lyon is domiciled in the District of Columbia. He brings suit herein in his own name, and derivatively as a shareholder of L-C Inc. and I.C.E., Inc., in the name of those corporations.

2. Defendant Larry A. Campbell is domiciled in the State of Florida.

3. Defendant Edward W. Storke's present domicile is not known with certainty, but he is not believed to reside in the District of Columbia.

4. Defendant Robert B. Cook is domiciled in the State of Florida.

5. Accordingly, since complete diversity of citizenship exists between the parties and the amount in controversy exceeds $50,000, subject matter jurisdiction exists in this Court. Personal jurisdiction exists over each defendant, and venue is appropriate in this District, because the land at issue is in this District and because certain of the acts and omissions complained of herein occurred in this District.

Factual Background

L-C Inc.'s Purchase of Oxen Hill Manor

6. In 1971, Larry A. Campbell ("Campbell") and John W. Lyon ("Lyon") formed I.C.E., Inc. ("ICE"), a holding company. ICE was and is equally owned by Campbell and Lyon. Its board of directors is comprised of Campbell, Lyon, and Edward W. Storke ("Storke").

7. L-C Inc. subsequently was incorporated by Campbell and Lyon. It is wholly owned by ICE. The L-C Inc. Board of Directors initially was comprised of Campbell, Lyon and Storke.

8. By deed dated September 30, 1974 and recorded October 3, 1974, L-C Inc. became the record owner in fee simple of a parcel of land containing approximately 80 acres, located principally in Prince George's County and partly in the District of Columbia, commonly known as Oxon Hill Manor. L-C Inc.'s purchase price for Oxon Hill Manor was $495,000. Oxon Hill Manor is alternately known as the following: (1) the Oxon Cove property, (2) the Blue Plains property; and (3) the Fox Ferry Road property.

9. L-C Inc. purchased Oxon Hill Manor for the purpose of operating it as a landfill for materials excavated from land development projects. However, L-C Inc. was unsuccessful in obtaining a permit for such use of the property. Consequently, for approximately 20 years subsequent to the acquisition of Oxon Hill Manor, L-C Inc. attempted unsuccessfully to find a purchaser for the property.

Negotiations With Corrections Company of America

10. In January 1995, Lyon, on behalf of L-C Inc., entered into negotiations with Joseph Johnson ("Johnson"), on behalf of the Corrections Corporation of America ("CCA"), for the sale of Oxon Hill Manor by L-C Inc. to CCA. CCA was interested in purchasing the property for use in the construction of a correctional facility to house federal prisoners and/or District of Columbia minimum security inmates.

11. At the time CCA entered into negotiations for the purchase of Oxon Hill Manor, CCA did not have a commitment from any governmental entity that such use of Oxon Hill Manor would be approved.

12. On January 1, 1995, CCA forwarded to Lyon an Option/Earnest Money Contract (the "Contract") for consideration by L-C Inc. Lyon forwarded a copy of the Contract to Campbell immediately after receiving it.

13. On January 9, 1995, Campbell informed Lyon that he did not want to consider CCA's offer to purchase Oxon Hill Manor. On January 12, 1995, Campbell reiterated to Lyon his position that they should not negotiate for the sale of Oxon Hill Manor.

14. On January 18, 1995, Lyon requested a special meeting of the boards of directors of L-C Inc. and ICE to consider CCA's interest in Oxon Hill Manor. Via letter, Lyon informed Campbell and Storke of his belief that "[t]o not follow through with such an exploration at this early stage would, in my view, be a mistake inasmuch as there has been little interest shown in this parcel over the years. To turn our backs on this rare expression of interest would seem contrary to our fiduciary obligations as directors of L-C, Inc. and I.C.E., Inc." This letter generated no response from either Campbell or Storke and the meeting proposed by Lyon never occurred.

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facility. If approval was not forthcoming within those six months, then CCA proposed to purchase an additional 90-day option to purchase the land. The 90-day option was to contain a clause which would allow L-C Inc. to close the option and move to a settlement upon 10 days notice. CCA offered L-C Inc. a purchase price of $2.5 million for the land.

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18. On February 28, 1995, Campbell advised Lyon that the terms of the Contract were unacceptable to him. Despite the fact that the property had been on the market for approximately 20 years, Campbell insisted that the asking price be between $6.5 and 7 million and that a large deposit be required. Additionally, Campbell maintained that he would not find a contract to be acceptable if it contained any contingencies other than that for clear title.

19. On March 6, 1995, Campbell instructed Lyon to continue negotiating with CCA for sale of Oxon Hill Manor.

20. On March 21, 1995, Lyon forwarded to Campbell a new version of the Contract along with a $10,000 check from CCA to Campbell. Lyon requested an immediate meeting of the L-C Inc. and ICE Boards of Directors to consider CCA's offer. Campbell did not respond to Lyon's request.

21. On April 10, 1995, Johnson expressed CCA's disappointment that L-C Inc. had not responded to CCA's proposal to purchase Oxon Hill Manor and requested a resolution as soon as possible. Johnson stated, *inter alia*, that

"LC Inc.'s unwillingness to make a counteroffer or suggest other options considering the fact that the property has been sitting unused for twenty years indicates to us that there may be factors outside of our control which are affecting a decision on our proposal. If there are internal problems or business interferences with respect to this property which cannot be resolved in order to pursue this opportunity, please notify me and return our $ 10,000 check by April 17, 1995."

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22. Pursuant to the L-C Inc. by-laws, new directors are to be elected at the annual meeting of L-C Inc. shareholders each June. Removal of an existing director is a separate and distinct action from electing a new director.

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$4 million. Included in this counteroffer was a contingency mirroring that which Campbell earlier had insisted was unacceptable. Specifically, CCA was given the option of making a $90,000 nonrefundable deposit at the inception of the Contract in exchange for a six-month period in which they could conduct due diligence and obtain the necessary approvals for development of the property. Upon expiration, this due diligence period could be extended for an additional six months for payment of an additional $90,000 deposit. CCA accepted this offer.

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32. To date, Lyon's repeated requests for information pertaining to that settlement have been wholly ignored. Consequently, he does not know where the funds are, how they are invested, what the expenses have been, or whether a final tax return has been filed for ICE. On information and belief, a portion of these funds have been paid to the bankruptcy trustee in In re. Excavation Construction, Inc., Case No. 79-01535, pending in this Court.

COUNT ONE
(Conversion)

33. Paragraphs 1 through 32 are hereby realleged.

34. By wrongfully failing to cause the tender to Lyon of Lyon's share of the proceeds of the sale of Oxon Hill Manor, defendants have wrongfully converted those funds.

COUNT TWO
(Breach of Contract)

35. Paragraphs 1 through 32 are hereby realleged.

36. By wrongfully failing to cause the tender to Lyon of Lyon's share of the proceeds of the sale of Oxon Hill Manor, Campbell has breached his contractual arrangements with Lyon concerning the formation of ICE and L-C Inc. and the use and distribution of assets held by those entities. In particular, those contractual arrangements included the implied term that funds such as those here at issue would not be wrongfully withheld from distribution to shareholders.

COUNT THREE
(Breach of Fiduciary Duty)

37. Paragraphs 1 through 32 are hereby realleged.

38. By wrongfully failing to cause the tender to Lyon of Lyon's share of the proceeds of the sale of Oxon Hill Manor, by failing to wrap up remaining issues relating to that sale as detailed above, including but not limited to resolution of the sale's tax consequences, and by failing to respond to Lyon's repeated requests for information, defendants have breached the fiduciary duty they owe to Lyon as a result of defendants' positions as officers and/or directors of L-C Inc. and/or ICE, Defendants' conduct in this regard has been extreme and outrageous. Moreover, Mr. Lyon alleges derivatively that, by virtue of the same conduct, defendants have breached the fiduciary duty they owe to L-C Inc. and ICE to manage their corporate affairs fairly, with care, and so as to avoid corporate liability to Mr. Lyon and the Internal Revenue Service.

PRAYER FOR RELIEF

39. As a direct and proximate result of defendants' above-described acts and omissions, Lyon has been damaged. Consequently, Lyon prays for an award of compensatory damages, pre- and post-judgment interest, costs, expenses and attorneys' fees, punitive damages, and such other monetary relief as the Court may deem just under the circumstances. In addition, Lyon prays for injunctive relief in the nature of an order compelling an accounting of the above-described funds, as well as an order compelling defendants to cause the distribution of the above-described funds to the shareholders of ICE.

JURY DEMAND

A trial by jury is here by requested as to each and every allegation herein.

Respectfully submitted,
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(2)

Supreme Court, U.S.
FILED
SEP 27 2002
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No. 02-0138

In The

Supreme Court of the United States

LARRY A. CAMPBELL,

Petitioner,

v.

JOHN W. LYON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit correctly affirmed the carefully reasoned judgment of the United States District Court for the District of Maryland that, in this essentially garden-variety dispute between former business partners, petitioner Campbell inequitably withheld respondent Lyon's fair share of the proceeds of sale of a parcel of land.

BRIEF IN OPPOSITION FOR RESPONDENT JOHN W. LYON

Respondent John W. Lyon respectfully submits that the petition for writ of certiorari filed by petitioner Larry A. Campbell should be denied. The decisions below correctly adjudicate the merits of the underlying dispute between these former business partners concerning distribution of the proceeds of sale of a parcel of land. The constitutional claim urged by Mr. Campbell as his first "Question Presented for Review" never was urged or ruled upon below. Hence it has not been preserved for review by this Court. Moreover, it is nothing more than an attempt to constitutionalize a procedural ruling by the trial court that was carefully vetted by the Court of Appeals and correctly found to have been appropriate. The remainder of Mr. Campbell's petition for certiorari consists of a request that this Court exercise its supervisory power to overturn the carefully considered decisions of the courts below concerning the merits of this fairly ordinary equitable dispute between former business partners. As is evident from examination of the carefully reasoned opinions of the courts below, which apply Maryland common law and do not present any federal question, no basis exists for exercise of this Court's supervisory power in this case. Finally, this case presents no issue of national importance, there is no split of authority among the circuits or state courts concerning the applicable law, nor is there a conflict with Supreme Court precedent.

STATEMENT OF THE CASE[1]

For purposes of this Brief in Opposition, we respectfully adopt the statements of facts presented in the respective opinions of the United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Maryland, appended to the Petition for Certiorari. In essence, petitioner Campbell and respondent Lyon owned, through corporate intermediaries, a valuable parcel of land. Mr. Campbell, operating with the assistance of others, took control of these corporate intermediaries. Following the sale of the land parcel, Mr. Campbell essentially appropriated all of the proceeds, denying Mr. Lyon his rightful share.

REASONS FOR DENYING THE WRIT

This equitable dispute between business partners, the merits of which were carefully parsed and adjudicated by the courts below, does not warrant review by this Court. There is no split in authority among the circuits or the state courts of last resort concerning the applicable law, nor is there any conflict with Supreme Court precedent. The case presents no issue of national importance. Rather, the federal courts below correctly applied the common law of the State of Maryland in formulating and upholding the

[1] We do not undertake in this Brief in Opposition to take issue with every assertion in Mr. Campbell's Petition for Certiorari with which we disagree. For the sake of brevity and in an effort to conserve Mr. Lyon's resources, we endeavor only to demonstrate, with as much economy as possible, why the decisions of the courts below are eminently correct and should not be disturbed.

verdict for Mr. Lyon. This is evident from the carefully presented findings of fact and conclusions of law of the District Court, the comprehensive reasons stated by the District Court in denying Mr. Campbell's motion for reconsideration, and the unassailable analysis set forth in the lengthy, unanimous, *per curiam* opinion issued by the Court of Appeals in upholding the District Court's verdict.

In the hope of attracting this Court's interest to this garden-variety commercial dispute, Mr. Campbell urges that the courts below infringed upon his rights under the Fifth Amendment to the United States Constitution by virtue of certain procedural rulings relating to Mr. Lyon's Complaint. The propriety of these procedural rulings was carefully considered by both courts below. *See, e.g.*, Appendix to Petition for Certiorari at 6, 12-14. No basis exists to disturb their conclusions. Moreover, Mr. Campbell's last-ditch effort to dress up this procedural issue as one of constitutional dimension is not cognizable here because he never urged below that the rulings at issue infringed upon his Fifth Amendment rights, a rather significant procedural omission which entirely escapes mention in Mr. Campbell's Petition for Certiorari. Accordingly review of the constitutional issue here is waived. *See generally Adams v. Washington*, 520 U.S. 83 (1997); *Beck v. Washington*, 369 U.S. 541 (1962).

The remainder of Mr. Campbell's petition consists of a request that this Court exercise its supervisory power to reverse the carefully reasoned application of Maryland common law by the District Court and the Court of Appeals. No authority is proffered by Mr. Campbell for this request for invocation of Supreme Court supervisory power. We are aware of none. "The Court's supervisory power over federal courts allows the Court to intervene to

protect the integrity of the federal system." *Frazier v. Heebe*, 482 U.S. 641, 648 (1987). We fail to see how the integrity of the federal court system is at risk in this case. The courts below carefully and faithfully applied Maryland common law to this case. We respectfully submit that no basis exists to disturb their decisions.

CONCLUSION

For these reasons, respondent John W. Lyon respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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John W. Lyon

No. 02-138

Supreme Court, U.S.
FILED
OCT 3 2002

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REPLY TO BRIEF IN OPPOSITION

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9 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Northern District of Maryland violated the Petitioner's due process rights under the Fifth Amendment to the United States Constitution by compelling the Petitioner to proceed to trial on a cause of action that: (i) had not been pled by the Respondent; (ii) was imposed *sua sponte* by the District Court less than one business day prior to commencement of trial; and (iii) shifted and elevated the burden of proof at trial from the Respondent to the Petitioner.

II. Whether the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Northern District of Maryland departed so far from the acceptable and usual course of judicial proceedings, by allowing the Respondent, in his capacity as a shareholder of a parent corporation, to maintain a direct cause of action against the board of directors of a subsidiary corporation in which the Respondent was not a shareholder, such that this Court should exercise its supervisory power.

III. Whether the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Northern District of Maryland departed so far from the acceptable and usual course of judicial proceedings, by granting equitable relief to Respondent after the District Court's finding that the Respondent and one of his witnesses had committed perjury both at trial and in prior proceedings in the case, such that this Court should exercise its supervisory power.

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REPLY ARGUMENT

I. THE PETITIONER HAS NOT WAIVED HIS CONSTITUTIONAL CLAIM THAT THE DISTRICT COURT'S *SUA SPONTE* RULINGS ON THE EVE OF TRIAL, AS AFFIRMED BY THE FOURTH CIRCUIT, PREJUDICED HIM AND VIOLATED HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Respondent Lyon's assertion in his Brief in Opposition that Petitioner Campbell's constitutionally-based claim has been waived is devoid of merit. In his Brief in Opposition, Respondent Lyon erroneously asserts that this claim "is not cognizable here because he [Petitioner Campbell] never urged below that the rulings at issue infringed upon his Fifth Amendment rights, ..."See Brief in Opposition, p. 3. Respondent Lyon, while never uttering one word about the substantive merits of the constitutional claim, then editorializes that this is "a rather significant procedural omission which entirely escapes mention in Mr. Campbell's Petition for Certiorari." Id.

Respondent Lyon, however, could not be more wrong, both as a matter of law and as a matter of fact. Ironically, and contrary to Respondent Lyon's contention, the "omission which entirely escapes mention "occurs in Respondent Lyon's own Brief in Opposition and not in Petitioner Campbell's Petition for Writ of Certiorari. Respondent Lyon's erroneous assertion shows a total disregard for prior rulings of this Court cited in Petitioner Campbell's Petition for Writ of Certiorari, as well as of the record in this case.

This Court, for example, addressed the very question of waiver urged here by Respondent Lyon in *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 120 S.Ct. 1579, 146 L. Ed. 2d

530 (2000), a case which was relied upon by Petitioner Campbell in his Petition but which was completely ignored by Respondent Lyon in his Brief in Opposition. Instead, and for obvious reasons, Respondent Lyon attempts to deflect this Court's attention to two prior decisions of this Court, *Adams v. Washington*, 520 U.S. 83, 117 S.Ct. 1028, 137 L. Ed. 2d 203 (1997) and *Beck v. Washington*, 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962), neither of which are on point here.

In *Nelson*, Respondent Adams, the same as Respondent Lyon here, urged that the due process claim had been waived by the petitioner because he did not raise the claim below. 529 U.S. at 469. This Court rejected Adams' argument in *Nelson*, the same as it should reject Respondent Lyon's argument here. In so ruling, this Court held in *Nelson* that:

> It is indeed the general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts. But this principle does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue (citation omitted).

Id. This Court then concluded in *Nelson* that the due process matter was fairly before the lower court because the petitioner's counsel argued that the "core of his clients' argument was the fundamental unfairness" of the process he was subjected to by the lower court and that the lower courts understood that was an issue before them. Id. at 470. The same is true here.

As explained in the Statement of the Case set forth in Petitioner Campbell's Petition for Writ of Certiorari, which is incorporated herein by reference, Petitioner Campbell's

counsel argued unfairness and prejudice as a result of the process he was subjected to by the lower court from the moment the trial court entered its *sua sponte* ruling on the eve of trial. Also as explained in the Statement of the Case, to make his objection clear and to ensure that the objection was properly preserved for appeal, counsel for Petitioner Campbell reiterated the objection on the record the very next business morning, before the trial commenced. Petitioner Campbell's counsel stated:

> And I just want to put on the record, Your Honor, our objection to going forward on the constructive trust . . . .

(App. 40). When asked by the lower court how Petitioner Campbell was prejudiced, moreover, Petitioner Campbell's counsel gave two very specific examples -- the first relating to the shift in the burden of proof and the second relating to the sudden unavailability of the presumptions afforded to Petitioner Campbell previously by the business judgment rule upon which all discovery and all prior proceedings had been premised. (App. 41-42). The lower court acknowledged but overruled Petitioner Campbell's objection (App. 42). Yet, less than 36 hours later, as further explained in Petitioner Campbell's Petition for Writ of Certiorari, these were the very reasons the District Court imposed a constructive trust on Petitioner Campbell.

On appeal, Petitioner Campbell argued at length the issues of unfairness and prejudice resulting from the lower court's actions. The Fourth Circuit, moreover, clearly understood that issue was before them. In point of fact, and again noticeably absent from Respondent Lyon's Brief in Opposition, the Fourth Circuit stated in pertinent part: "[W]e address Campbell's claim that he suffered unfair surprise and prejudice because the district court at the last

minute transformed Lyon's breach of fiduciary duty claim into a claim for imposition of a constructive trust." (App. 6).

There can be no dispute in this case that Petitioner Campbell did not waive his constitutionally-based claim that his due process rights were violated by the District Court's last minute *sua sponte* ruling, as affirmed by the Fourth Circuit. Indeed, the procedural improprieties were argued at every turn by Petitioner Campbell and those arguments were fairly before the lower court as required by *Nelson*. It is appropriate, therefore, for this Court to consider that claim and Petitioner Campbell again respectfully requests that the Court do so.

II. THE ALTERNATIVE GROUNDS FOR REVIEW ASSERTED BY PETITIONER CAMPBELL ALSO PRESENT PROPER BASES FOR REVIEW

The balance of Respondent Lyon's Brief in Opposition raises no new issues. Rather, Respondent Lyon merely purports to respond to issues raised in Petitioner Campbell's Petition for Writ of Certiorari by, again, misstating that no authority is cited by Petitioner Campbell for such alternative grounds for review. Petitioner Campbell, therefore, incorporates herein the balance of the arguments and legal authorities presented in his initial Petition as his Reply to Respondent Lyon's Brief in Opposition.

CONCLUSION

For the reasons stated herein, and in his Petition for Writ of Certiorari, Petitioner Larry A. Campbell respectfully submits that the questions presented herein merit consideration by this Court. Accordingly, Petitioner Larry A. Campbell respectfully requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review the decisions below.

Respectfully submitted,

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